D. JUSTINIANI
INSTITUTIONUM
LIBRI QUATUOR.

THE

FOUR BOOKS

OF

JUSTINIAN'S INSTITUTIONS,

Tranſlated into ENGLISH,

With NOTES,

BY

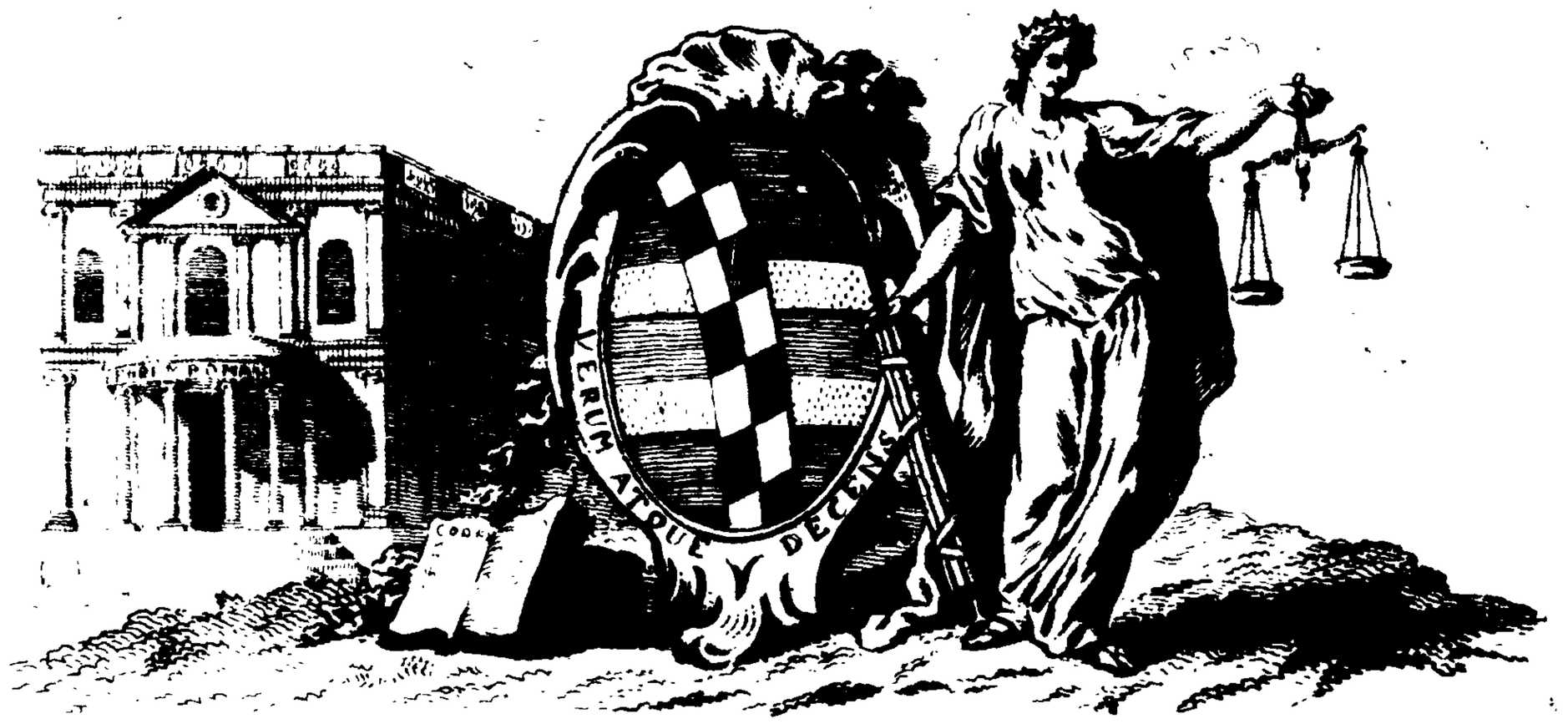
GEORGE HARRIS, LL. D.

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M DCC LVI.

MUSEUM
BELLAN
NACVM



TO

THE RIGHT HONORABLE

Sir GEORGE LEE, Knt, LL. D.

Official Principal of the Arches Court of *Canterbury*;
Maſter, Keeper or Commiſſary of the Prerogative Court of *Canterbury*;
Dean or Commiſſary of the Deaneries of the Arches, *London*, *Shoreham*, and *Croydon*;
Treaſurer to her Royal Highneſs the Princeſs Dowager of WALES;
And one of his Majeſty's moſt honorable PRIVY COUNCIL.

SIR,

HAVING endeavored to give the true meaning of the original in the following verſion of *Juſtinian's* Inſtitutions, I venture, SIR,

to

to beg your protection of this work, declaring, that I aſk it not from any imagination, that the engliſh part is worthy of your patronage; but ſolely from a reliance upon your known diſpoſition to incourage every attempt, which carries an appearance of being uſeful. For I have not the vanity to think, that the tranſlation is perfect, or that the notes, altho' chiefly collected from authors of character, may not appear in ſome places redundant, and in others defective; and yet I affect not to ſay, but that I have uſed my utmoſt diligence: but, when the ſuggeſtions of friends and a greater experience ſhall have informed me of my miſtakes, it ſhall then be my endeavor to correct what is wrong and add what is wanting. And, as I have the honor to attend thoſe courts, in which you ſo eminently preſide, I may hope to avail myſelf of the many opportunities of inſtruction, which muſt continually offer themſelves;

ſelves; during my attendence upon a judge, who, whileſt he is diſtinguiſhed by genius and revered for impartiality, is remarkable for a ſuperior ſkill in the law, and the quickeſt as well as the cleareſt diſcernment in the moſt intricate points of evidence.

Theſe, SIR, are the qualifications, with which you adminiſter juſtice, and gain the daily admiration of the moſt experienced in the law. But the benefits, confered by you, are not confined to individuals; your conduct as a Lord Commiſſioner of the Admiralty, and the ſatisfaction it gave the public, are ſufficiently known. But the Senate, and that high board, his Majeſty's Privy Council, (to which your merits and your virtues, which I may juſtly call Hereditary, have moſt deſervedly ſummoned you,) afford a much larger ſcope for the exertion of great talents: nor

is

is Britain more indebted to you for aſſiſtence in her domeſtic councils, than in her foreign negotiations. Even * Pruſſia, by having made no public reply, has confeſſed the force of thoſe arguments, in which you had ſo large a ſhare; and I have the ſatisfaction to add, that the people in general know the worth of their Advocate and have a due ſenſe of his ſervices; which they attribute, with one common voice, to his knowledge as a Civilian, to his experience as a Senator, to his abilities as a Stateſman; but, above all, to his integrity in every ſtation, as a man of the ſtricteſt honor.

* See the Report, dated 18 Jan. 1753, which was ſent in anſwer to Monſieur Michell's memorial, called *an Expoſition of the motives, which have determined the King of* Pruſſia *to lay an attachment upon the capital funds, which his* Pruſſian *Majeſty had promiſed to reimburſe to the ſubjects of Great* Britain, *in virtue of the Peace-treaties of* Breſlau *and* Dreſden; *and to procure to his ſubjects an indemnity for the loſſes, which they have ſuſtained by the depredations and violences of the* Engliſh *privateers.*

That

That you may therefore, SIR, long continue to adorn and ſupport that profeſſion, of which you are in every reſpect the chief; — that you may long enjoy thoſe honors, which your merit has obtained; — and that you may have health to execute the higheſt offices, which the future neceſſities of the ſtate may oblige you to accept;

are the ſincere and fervent wiſhes

of YOUR moſt obedient

and devoted ſervant,

Doctors Commons,
Feb. 25, 1756.

GEO. HARRIS.

ADVERTISEMENT.

THIS tranſlation of the Inſtitutions *of the civil law into* Engliſh *is principally intended, as an introduction to* Vinny's *Edition, and is publiſhed on a preſumption, that moſt young perſons are beſt acquainted with their own language; and that the Elements of a ſcience can never be made too eaſy to the learner.*

As to the few notes, which are added to this verſion, they are chiefly relative to the law of England: *but the tranſlator thinks it incumbent upon him to declare, that he does not print them from any opinion of his ability for ſuch an undertaking, but merely thro' an humble hope, that, imperfect as they are, they may raiſe the curioſity of the young reader to ſearch more deeply, and excite him to unite the ſtudy of the laws of his own country, (of which every* Engliſhman *ought to have a general knowledge,) with the ſtudy of the civil law, which is univerſally allowed to be the Maſter-work of human policy.*

A

BRIEF ACCOUNT

OF

The riſe and progreſs of the ROMAN LAW.

THE *Roman* ſtate was at firſt governed ſolely by the authority of *Romulus*; but, when the people were increaſed, he divided them into thirty *Curiæ*, which he conſtantly aſſembled for the confirmation of his laws: and this practice of conſulting the people was afterwards followed by the *Roman* kings, all whoſe laws were collected by *Sextus Papirius*, and called *Jus Papirianum*, from the name of their compiler. But, after the expulſion of *Tarquin* and the eſtabliſhment of the republic, the greateſt part of thoſe Regal laws ſoon became obſolete; and thoſe, which ſtill remained in force, related chiefly to the prieſthood. It thus happened, that the *Romans* for many years labored under great incertainty in reſpect to law in general; for, from the commencement of the conſular ſtate to the time of eſtabliſhing the XII tables, they were not governed by any regular ſyſtem. But at length, the people growing uneaſy at the arbitrary power of their magiſtrates, it was reſolved, after much oppoſition from the patricians, that ſome certain rule of government ſhould be fixed upon: and, to effect this purpoſe, a decemvirate was firſt appointed, compoſed ſolely of ſenators, who, partly from the laws of *Greece* and partly from their

Curiæ.] vid. *Pomponium*, ff. 1. t. 2. *De origine juris.*

Jus Papirianum.] "Is liber appellatur "*jus civile Papirianum*, non quia *Papirius* "de ſuo quicquam adjecit, ſed quod leges "ſine ordine latas in unum compoſuit." vid. ff. 1. t. 2. l. 2. This body of law is not now extant, nor any part of it, except a ſhort extract of 8 or 10 lines, which may be read in the 3d book of *Macrobius's Saturnalia*. cap. 11.

From the commencement of the conſular ſtate.] The conſular ſtate was eſtabliſhed in the year U. C. 245, and the laws of the 12 tables were not perfected, till the year 304.

own laws ſtill ſubſiſting, framed x tables, which, in the year of *Rome* 303, were ſubmitted to the inſpection of the people, and highly approved of. Theſe however were ſtill thought to be deficient; and therefore in the year following, when a new decemvirate was appointed, which conſiſted of ſeven patricians and three plebeians, they added two tables to the former ten: and now the whole was regarded but as one body of law, and intituled, by way of eminence, the *twelve tables*. But, altho' theſe new collected laws were moſt deſervedly in the higheſt eſteem, yet their number was ſoon found inſufficient to extend to all matters of controverſy, their conciſeneſs was often the occaſion of obſcurity, and their extraordinary ſeverity called aloud for mitigation. It therefore became a conſequence, that the twelve tables continually received ſome explanation, addition, or

Were ſubmitted to the inſpection of the people.] "Tum legibus condendis opera "dabatur, ingentique hominum expectatione propoſitis decem tabulis, populum ad "concionem advocaverunt: et, quod bonum, fauſtum, felixque reipublicæ, ipſis, liberiſque eorum eſſet, ire et legere leges propoſitas juſſere: ſe, quantum decem hominum ingeniis provideri potuerit, omnibus, ſummis infimiſque, jura æquaſſe: plus pollere multorum ingenia conſiliaque. Verſarent in animis ſecum unamquamque rem; agitarent deinde ſermonibus; atque in medium, quid in quaque re plus, minuſve eſſet, conferrent. Eas leges habiturum populum Romanum, quas conſenſus omnium non juſſiſſe latas magis, quam tuliſſe, videri poſſet." *Liv.* l. 3. cap. 33, 34.

And their extraordinary ſeverity.] One of the laws, here hinted at, is the following, AST, SI PLURES ERUNT REI, TERTIIS NUNDINIS PARTIS SECANTO; SI PLUS MINUSVE SECUERINT, SE FRAUDE ESTO; SI VOLENT ULS TIBERIM PEREGRE VENUNDANTO. *Grav. op.* p. 284. *i. e.* "If a debtor is inſolvent to ſeveral creditors, "let his body be *cut* in pieces on the third "market-day. It may be cut into more or "fewer pieces with impunity: or, if his "creditors conſent to it, let him be ſold to "foreigners beyond the *Tyber*." *Hook's Roman hiſt.* vol. 1. p. 316.

Such is the ſenſe, in which this law has been generally underſtood by both antients and moderns. But it has lately received quite a new conſtruction, very much to the honor of antient *Rome*, from two authors, not leſs diſtinguiſhed for their abilities in literature than their knowledge in the civil law, who from many authorities interpret the word *ſecanto*, as implying ſimply a diviſion, and the word *partis*, as denoting the parts of the debtor's eſtate, and not the parts of his body; ſo that they underſtand the expreſſion *partis ſecanto*, not as a direction, that the body of an inſolvent debtor ſhall be cut into pieces, but as if it meant, that his eſtate and ſervices ſhould be divided among his creditors in proportion to their reſpective claims. vid. *Eynkerſhoeck's* works, vol. 1. obſ. 1. and Dr. *Taylor's* commentary, *De inope debitore* diſſecando.

But the reader is left to frame his own judgment of this interpretation, when he has read the apology for this law, which *Aulus Gellius* has given us in the perſon of *Cæcilius*; and alſo the opinion of *Tertullian*, who was a lawyer by profeſſion. "Nihil profecto [ſays *Cæcilius*] "immitius, nihil immanius, "niſi, ut re ipſa apparet, eo conſilio tanta "immanitas pœnæ denunciata eſt, ne ad "eam unquam perveniretur: *addici* namque "nunc et *vinciri* multos videmus; *diſſectum* "eſſe antiquitus neminem, equidem neque "legi neque audivi." *Aulus Gell.* lib. 20. cap. 1. *Grav.* lib. 7. cap. 72.

And *Tertullian* writes as follows. "Sed "et, judicatos in partes ſecari a creditoribus, "leges erant; conſenſu tamen publico *cru*-"*delitas* poſtea eraſa eſt." *Apologet.* cap. 4.

alteration,

alteration, by virtue of a new *law*, a ſenatorial *decree*, or a *plebiſcite*. And here it will be proper to obſerve, how they differ: a *plebiſcite* was an ordinance of the plebeians or commonalty, which had the force of a law, without the authority of the ſenate; and a *ſenatus-conſultum*, or ſenatorial decree, was an order made by the ſenators aſſembled for that purpoſe; but to conſtitute a *law*, properly ſo called, it was neceſſary, that it ſhould firſt be propoſed by ſome magiſtrate of the ſenate, and afterwards be confirmed by the people in general. Recourſe was alſo had to the interpretation and deciſions of the learned, which were ſo univerſally approved of, that, altho' they were unwriten, they became a new ſpecies of law, and were called *Auctoritas Prudentum* and *Jus civile*. It muſt here be obſerved, that ſoon after the eſtabliſhment of the twelve tables, the learned of that time compoſed certain ſolemn forms, called *Actions of law*, by which the proceſs of all courts and ſeveral other acts, as adoption, emancipation, *&c.* were regulated. Theſe forms were for above a century kept ſecret from the public, being in the hands only of the prieſts and magiſtrates; but about the year U. C. 448 they were collected and publiſhed by one *Flavius*, a ſcribe; and, from him, called the *Flavian law*; for which acceptable preſent the people in general ſhewed many inſtances of their gratitude. But, as this collection was ſoon found to be defective, another was afterwards publiſhed by *Sextus Ælius*, who made a large addition of many new forms, which paſſed under the title of *Jus Æliamum*, from the name of the compiler.

Solemn forms.] "Civile jus, repoſitum "in penetrallibus pontificum, Cn. Fla- "vius vulgavit, faſtoſque circa forum in "albo propoſuit, ut, quando lege agi poſſet, "ſciretur." *Liv.* lib. 9. cap. 46. "Ve- "teres, qui hanc ſcientiæ præfuerunt, ob- "tinendæque augendæ potentiæ ſuæ cau- "ſa, pervulgari artem ſuam noluerunt, *&c.*" *Cic. de orat.* lib. 1. c. 56. "Jus civile per "multa facula inter ſacra cærimoniaſque "Deorum immortalium abditum, ſolique "pontificibus notum." *Val. Max.* l. 2. c. 5.

The *Flavian Law.*] "Poſtea, cum Ap- "pius Claudius propoſuiſſet, et ad formam "redegiſſet, has actiones, Cnæus Flavius "ſcriba ejus, libertini filius, ſubreptum li- "brum populo tradidit; et adeo gratum fuit "id munus populo, ut Tribunus plebis fieret, "Senator, et Ædilis curulis, *&c.*" ff. 1. t. 2. *de orig juris.* *Liv.* lib 9. ſub.fin. *Val. Max.* lib 2. cap. 5. *Aul. Gel.* lib. 6. c. 9.

Tully, in his oration for *Muræna*, is remarkably ſevere upon theſe forms, and treats both them and their abettors with that juſt contempt, which they moſt certainly deſerve. "Primum dignitas in tam tenui "ſcientia quæ potest eſſe? Res enim ſunt "parvæ, propositi ſingulis diebus actionibus "terpunctionibus occupati, *&c. &c. &c.*" *Pro Murena*, cap. 6. *Leges ad fit.* lib. 6. ep. 1. *De orat re* lib. 1. cap. 4.

But, notwithſtanding this, the uſe of particular forms was ſcrupulouſly adhered to, till the reign of *Conſtantine* the Emperor, who, to his great honor, put an end to theſe ſubtilities. His reſcript to *Marcellinus* is in theſe words. "Juris formulæ, aucupationis fal- "lacium inſidiantes, cunctorum actibus "radicitus amputentur." Cod. 2. t. 58.

In proceſs of time there alſo aroſe another ſpecies of law, called the *Prætorian Edicts*; which, altho' they ordinarily expired with the annual office of the Prætor, who enacted them, and extended no farther than his juriſdiction, were yet of great force and authority: and many of them were ſo truly valuable for their juſtice and equity, that they have been perpetuated as *laws*.

Theſe were the ſeveral principal parts of the *Roman* law, during the free ſtate of the commonwealth; but, after the re-eſtabliſhment of monarchy in the perſon of *Auguſtus*, the law received two additional parts, the imperial *conſtitutions* and the *anſwers* of the lawyers.

The conſtitutions ſoon became numerous, but were not framed into a body, till the reign of *Conſtantine* the great; when *Gregorius* and *Hermogenes*, both lawyers of eminence, collected in two codes the conſtitutions of the pagan emperors, from the reign of *Adrian* to that of *Dioclefian* incluſive: but theſe collections were not made by virtue of any public authority, and are not now extant.

Another code was afterwards publiſhed by order of the emperor *Theodoſius* the younger, which contained the conſtitutions of all the chriſtian emperors, down to his own time; and this was generally received both in the eaſtern and weſtern empires.

But theſe three codes were ſtill far from being perfect; for the conſtitutions, contained in them, were often found to be contradictory; and they wanted, but too plainly, that regulation, which they afterwards underwent through the care of *Juſtinian*; who in the year of Chriſt 528 ordered the compilation of a new Code, which was performed and publiſhed the year following by *Tribonian* and others; the three former codes being ſuppreſſed by the expreſs ordinance of the emperor. When

Gregorius and *Hermogenes*.] vid. *Gothofredi* prolegom. ad Cod. *Theodoſianum*, cap. 1. et *Heineccii* hiſt. jur. civ. lib. 1. cap. 5. ſect. 368, &c.

By the expreſs ordinance.] "Hunc igitur "codicem in æternum valiturum judicio tui "culminis intimare perſpeximus, ut ſciant "omnes tam litigatores quam diſertiſſimi advocati, nullatenus eis licere de cætero conſtitutiones ex veteribus tribus codicibus, vel "ex iis, quæ novellæ conſtitutiones ad præſens tempus vocabantur, in cognitionalibus recitare certaminibus, ſed ſolum, eidem noſtro codici inſertis, conſtitutionibus "neceſſe eſt uti: falſi crimini ſubdendis his, "qui contra hoc facere auſi fuerint, &c." *De Juſtinianeo codice confirmando.*

this work was thus expeditiously finiſhed, the emperor next extended his care to the Roman law in general, in order to render it both conciſe and perfect. The anſwers and other writings of the antient lawyers had long ſince acquired the full force of a *law*, and were now ſo numerous as to conſiſt of near two thouſand volumes; from which, by command of *Juſtinian*, the beſt and moſt equitable opinions were choſen; and, being firſt corrected, where correction was neceſſary, were afterwards divided into fifty books, called *Digeſts* or *Pandects*: and, that they might be the more firmly eſtabliſhed, the emperor not only prohibited the uſe of all other law-books, but alſo forbad, that any comment ſhould be writen upon theſe his new digeſted laws, or that any tranſcript ſhould be made of them with abbreviations. But, during the time of compiling the *Digeſts*, it was thought expedient by *Juſtinian*, for the benefit of ſtudents, that an abridgment ſhould be made of the whole Roman law; which work was ſoon performed in obedience to his order, and confirmed with the *Digeſts*, under the Title of *Inſtitutions*.

Near two thouſand volumes.] "Poſtea "vero, maximum opus aggredientes, ipſa "vetuſtatis ſtudioſiſſima opera, jam pene "confuſa et diſſoluta, eidem viro excelſo "(Triboniano) permiſimus tam colligere "quam certo moderamine tradere. Sed, "cum omnia percontabamur, a præfato viro "excelſo ſuggeſtum, duo pene millia libro-"rum eſſe conſcripta; quæ neceſſe eſſet "omnia et legere et perſcrutari: quod cœ-"leſti fulgore, et ſummæ trinitatis favore, "confectum eſt, ſecundum noſtra mandata, "quæ ab initio ad memoratum virum excel-"ſum fecimus, et in quinquaginta libros "omne, quod utiliſſimum erat, collectum "eſt; et omnes ambiguitates deciſæ, nullo "ſeditioſo relicto; nomenque libris impo-"ſuimus *Digeſtorum* ſeu *Pandectarum*." "Cod. 1. t. 17. l. 2. *de vet. jur. enucl.*

Prohibited the uſe of all other law-books.] "Has itaque leges et adorate et obſervate, "omnibus antiquioribus quieſcentibus, ne-"moque veſtrum audeat vel comparare eas "prioribus, vel, ſi quid diſſonans in utro-"que eſt, requirere; quia omne, quod hic "poſitum eſt, hoc unicum et ſolum obſer-"vari cenſemus; nec in judicio nec in alio "certamine, ubi leges neceſſariæ ſunt, ex "aliis libris, niſi ab inſtitutionibus, noſtriſque "digeſtis, et conſtitutionibus a nobis com-"poſitis, aliquid vel recitare vel oſtendere "conetur; niſi temerator velit falſitatis cri-"mini ſubjectus una cum judice, qui eorum "audientiam patiatur, pœnis graviſſimis la-"borare." Cod. 1. t. 17. l. 2. ſec. 19.

"Hoc autem tempeſtivum nobis videtur "et in præſenti ſancire, ut nemo neque "eorum, qui in præſenti juris peritiam ha-"bent, neque, qui poſtea fierent, audeat "*commentarios* his legibus adnectere; niſi ve-"lit eas in Græcam vocem transformare "ſub eodem ordine eademque conſequen-"tia, ſub qua et voce Romana poſita ſunt; "hoc quod Græci κατὰ πόδα dicunt, &c." Cod. 1. t. 17. l. 2. § 21.

With abbreviations.] "Eandem autem "pœnam falſitatis conſtituimus et adver-"eos, qui in poſterum leges noſtras, per "figlorum obſcuritates, auſi fuerint conſcri-"bere: omnia enim, id eſt, et nomina pru-"dentum, et titulos, et librorum numeros, "per conſequentias literarum volumus, non "per figla, manifeſtari." Cod. 1. t. 17. l. 2. § 22.

Confirmed with the *Digeſts*.] "Leges "autem noſtras, quæ in his codicibus, id "eſt, inſtitutionum ſeu elementorum et di-

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The emperor afterwards, upon mature deliberation, ſuppreſſed the firſt edition of his Code, and publiſhed a ſecond, which he intituled *Codex repetitæ prælectionis*, having omitted ſeveral uſeleſs laws, and inſerted others, which were judged ſerviceable to the ſtate.

The *Juſtinian*-law now conſiſted of three parts, the *Inſtitutions*, the *Digeſt*, and the *ſecond Code*. But the emperor, after the publication of the *ſecond Code*, continued from time to time to enact diverſe new conſtitutions or *Novels*, and alſo ſeveral *Edicts*, all which were collected after his deceaſe, and became a fourth part of the law.

The 13 *Edicts* of *Juſtinian* and moſt of the *Novels* were originally conceived in the *Greek* Tongue; and ſo great was the decline of the *Roman* language at *Conſtantinople* within forty years after the death of this emperor, that his laws in general were not otherways intelligible to the major part of the people, than by the aſſiſtence of a *Greek* verſion: but, notwithſtanding this diſadvantage, they ſtill ſubſiſted intire, till the publication of the *Baſilica*, by which the Eaſt was governed, till the diſſolution of the empire.

" geſtorum, poſuimus, ſuum obtinere robur " ex tertio noſtro felicißimo ſancimus con- " ſulatu præſentis duodecimæ indictionis, " tertio calendas januarias, in omne ævum " valituras. &c." Cod. 1. t. 17. l. 2. § 23.

Suppreſſed the firſt edition of his code.] " Nec enim in poſterum concedimus, vel " ex deciſis a nobis rebus, vel ex aliis con- " ſtitutionibus, quas antea fecimus, vel ex " prima Juſtiniani codicis editione, aliquid " recitare: ſed, quod in præſenti purgato et " renovato codice noſtro ſcriptum invenitur, " hoc tantummodo in omnibus rebus et ju- " diciis et obtineat et recitetur: cujus ſcrip- " turam, ad ſimilitudinem noſtrarum inſtitu- " tionum et digeſtorum, ſine ulla ignorum " dubietate conſcribi juſſimus." *De Emendatione Cod.* ſect. 5.

Baſilica.] " Verſionibus juris Juſtinianei " Græcis, et novellis eadem lingua ſcriptis, " in foris ſcholiſque utebantur, donec, de " eo in compendium mittendo ſæculo nono " cogitare inciperent imperatores Byzanti- " ni. Ex his primum Baſilius Macedo anno " 878 ediderat πρόχειρον νόμων, quod con- " ſtabat tituli quadraginta. Deinde Leo, " σοφος, patri Baſilio ſuccedens, collectionem " illam paternam perfecit, eamque ſub titulo " Διαταξεων Βασιλικων promulgavit, anno Chriſti " 886. Denique ſubſecutus Leonem Con- " ſtantinus, cognomento Porphyrogeneta, " paternum opus ſub incudem revocavit, et " libros illos Βασιλικα publicavit ſub initium " ſæculi decimi. Et hi quidem ſunt libri " illi Βασιλικα, ex Græca inſtitutionum, " pandectarum, codicis, verſione, Juſtinia- " ni novellis et edictis tredecim, nec non ex " jurisconſultorum quorundam orientalium " paratitlis, aliiſque libris, quin et patribus " et conciliis collecti; ita tamen ut multa " omiſſa videamus, quæ fortaſſis tum ab uſu " receſſerant, multas etiam leges in com- " pendium contractas, multa denique ex " poſteriorum principum legibus et conſti- " tutionibus addita animadvertamus. Opus " iſtud in ſexaginta libros diviſum, præter " pauca, quæ nondum integra reperiri po- " tuerunt, cum gloſſis græce et latine edi- " tum eſt a *Car. Annib. Fabrotto*, Pariſ. " 1647. fol. vol. vii." vid. *Heineccii hiſt. jur. civ.* l. 1. ſect. 405.

The diſſolution of the empire.] *Conſtantinople* was taken by the *Turks*, and a period was put to the eaſtern empire in the year of Chriſt, 1453.

The

The laws publiſhed by *Juſtinian* were ſtill leſs ſucceſsful in the Weſt; where, even in the life-time of the emperor, they were not received univerſally; and, after the *Lombard* invaſion, they became ſo totally neglected, that both the *Code* and the *Pandects* were loſt, till the 12th Century; when it is ſaid, that the Pandects were accidently recovered at *Amalphi*, and the Code at *Ravenna*. But, as if fortune would make an attonement for her former ſeverity, they have ſince been the ſtudy of the wiſeſt men, and revered, as law, by the politeſt nations.

After the *Lombard* invaſion.] The *Lombards* entered *Italy* under *Alboinus* about the year of Chriſt 568, in the reign of *Juſtin* the ſecond, ſucceſſor to *Juſtinian*.

At *Amalphi*.] "Eo tempore (anno Dom. 1130) "injuſtis perturbatiſque comitiis la-"cerarat eccleſiam falſus pontifex *Petrus* "*Leonis*, *Anacletus* ſecundus nuncupatus ab "ſua factione; cujus dux erat *Rogerius* Apu-"liæ ac Siciliæ comes, Regis nomine a fal-"ſo pontifice donatus. Adverſus *Anacle-*"*tum* creatus rite ac ſolenniter fuerat *In-*"*nocentius* ſecundus, cui favebat imperator "*Lotharius Saxo*, ſumma virtute atque pru-"dentia princeps; quo bellum gerente ad-"verſus *Rogerium*, *Amalphi*, urbe Salerno "proxima, (quam perperam aliqui locant in "*Apulia*, *Melphiam* cum *Amalphi* confun-"dentes,) inopinato reperti fuerunt Digeſto-"rum libri; quos *Piſani*, qui claſſe *Lotha-*"*rium* contra *Rogerium* adjuverant, præ-"mio bene navatæ operæ ſibi exorarunt. "Piſis vero poſt longam obſidionem a *Ca-*"*ponio* militiæ duce ſtrenuo expugnatis, "tranſlati fuere *Florentiam*: ubi, pro Au-"guſta Mediceæ domus magnificentia, in "muſeo magni ducis conſervantur. Hinc "promiſcua Piſanarum et Florentinarum "apud ſcriptores pandectarum appellatio. "Iiſdem temporibus repertum *Ravennæ* fuit "conſtitutionum imperialium volumen, "quod *codex* appellatur: indeque cæteros li-"bros juris, imo et digeſtorum aliud exem-"plar in lucem aliqui rediiſſe putant: nec "mirum, cum ea urbs longo tempore Ro-"manis legibus vixerit, et orientali Roma-"norum imperio diu obtemperavit. No-"vellæ vero conſtitutiones etiam antea per "Italiam vagabantur; utque mea fert opi-"nio, multi juris civilis libri, poſtquam in-"ceſſit homines cupido recipiendi Romani "juris, agniti potius fuere, quam reperti: "nam, et aliquot ante *Lotharium* annis, jus "civile Juſtiniani commemoravit *Ivo* Carno-"tenſis, et libros pandectarum; cum antea, "ſi occurrerent, forſan ſocordia et oblivione "prætermitterentur." vid. *Gravinæ orig. jur. civ.* lib. 1. cap. 140. et *Hein. hiſt. jur. civ.* lib. 1. ſect. 412.

PROOEMIUM
DE
Confirmatione Inſtitutionum.

In nomine Domini noſtri JESU CHRISTI.

Imperator, Cæſar FLAVIUS JUSTINIANUS, *Alemanicus, Gothicus, Francicus, Germanicus, Anticus, Alanicus, Vandalicus, Africanus, Pius, Felix, Inclytus, Victor ac Triumphator, ſemper Auguſtus,* cupidæ legum juventuti *S. D.*

De uſu armorum et legum.

IMPERATORIAM majeſtatem non ſolum armis decoratam, ſed etiam legibus oportet eſſe armatam; ut utrumque tempus et bellorum et pacis recte poſſit gubernari: et princeps Romanus non ſolum in hoſtilibus præliis victor exiſtat, ſed etiam per legitimos tramites calumniantium iniquitates expellat: et fiat tam juris religioſiſſimus, quam, victis hoſtibus, triumphator magnificus.

The imperial dignity ſhould be ſupported by arms, and guarded by laws, that the people, in time of peace as well as war, may be ſecured from dangers and rightly governed: for a Roman Emperor ought not only to be victorious over his enemies in the field, but ſhould alſo take every legal courſe to clear the ſtate from all thoſe members, whoſe crafts and iniquities are ſubverſive of the law. Be it the care therefore of him, upon whom government devolves, to be renowned for a moſt religious obſervance of law and juſtice, as well as for his triumphs.

De bellis et legibus Juſtiniani.

§ I. Quorum utramque viam cum ſummis vigiliis, ſummaque providentia, annuente Deo, perfecimus. Et bellicos quidem ſudores noſtros bar-

baricæ gentes, ſub juga noſtra redactæ, cognoſcunt: et tam Africa, quam aliæ innumeratæ provinciæ, poſt tanta temporum ſpatia, noſtris victoriis a cœleſti numine præſtitis, iterum ditioni Romanæ noſtroque additæ imperio, proteſtantur. Omnes vero populi legibus tam a nobis promulgatis, quam compoſitis, reguntur.

§ 1. *By our inceſſant labors, and the aſſiſtence of divine providence, we have acquired the double fame of a lawgiver and a conqueror; for the barbarian nations have proved us in battle and ſubmitted to our yoke; even* Africa *and many other provinces, after ſo long an interval, are again added to the* Roman *empire: and yet this vaſt people, and our whole dominions, are governed either by laws enacted by ourſelves; or laws, which, tho' framed by others, have by our ſovereign authority been better regulated.*

Poſt tanta temporum ſpatia.] *Africa* had then been 95 years in the poſſeſſion of the *Vandals*. *Cod.* 1. *t.* 27. *l.* 1. *de off. PP. Af.*

De compoſitione Codicis et Pandectarum.

§ II. Et cum ſacratiſſimas conſtitutiones, antea confuſas, in luculentam erexímus conſonantiam, tunc noſtram extendimus curam ad immenſa veteris prudentiæ volumina, et opus deſperatum, quaſi per medium profundum euntes, cœleſti favore jam adimplevimus.

§ 2. *When we had ranged the imperial conſtitutions in a regular order, and made thoſe, which were before confuſed and contradictory, to agree perfectly with each other, we then extended our care to the numerous volumes of the antient law; and have now completed, thro' the favor of heaven, a work, which exceeded even our hope, and was attended with the greateſt difficulties.*

De tempore, auctoritatibus, fine et utilitate compoſitionis Inſtitutionum.

§ III. Cumque hoc, Deo propitio, peractum eſt, Triboniano, viro magnifico, magiſtro, et exquæſtore ſacri palatii noſtri, et exconſule, nec non Theophilo et Dorotheo, viris illuſtribus, anteceſſoribus, (quorum omnium ſolertiam, et legum ſcientiam, et circa noſtras juſſiones fidem, jam ex multis rerum argumentis accepimus,) convocatis, mandavimus ſpecialiter, ut ipſi noſtra auctoritate, noſtriſque ſuaſionibus, Inſtitutiones componerent; ut liceat vobis prima legum cunabula non ab antiquis fabulis diſcere, ſed ab imperiali ſplendore appetere: et tam aures, quam animi veſtri, nihil inutile, nihilque perperam poſitum, ſed quod in ipſis rerum obtinet argumentis, accipiant. Et quod priore tempore vix poſt quatriennium prioribus contingebat, ut tunc conſtitutiones imperatorias legerent, hoc vos a primordio ingrediamini, digni tanto honore, tantaque referti felicitate, ut et initium vobis, et finis legum eruditionis, a voce principali procedat.

§ 3. *As ſoon as this our undertaking was accompliſhed, we ſummoned* Tribonian, *our chancellor, with* Theophilus *and* Dorotheus, *men of known learning and tried fidelity, whom we injoined by our authority to compoſe the following Inſtitutions, to the intent, that the rudiments of law might be more effectually learned, by the ſole*

means

means of our imperial authority; and that your minds for the future ſhould not be burdened with obſolete and unprofitable doctrines, but inſtructed only in thoſe laws, which are allowed of and practiſed. And, whereas it was formerly neceſſary, that all ſtudents ſhould go thro' a courſe of ſtudy, at leaſt for the ſpace of four years, preparatory to their reading the conſtitutions, they may now, (having been thought worthy of our princely care, to which they are indebted for the beginning and end of their ſtudies,) apply themſelves immediately to the imperial ordinances.

Nec non Theophilo.] There is great reaſon to think, that the *Theophilus*, here mentioned, is the ſame *Theophilus*, who wrote the Greek paraphraſe upon the Inſtitutions. *vid. Heinec. Hiſt. Jur. lib.* 1. *ſect.* 402.

Diviſio Inſtitutionum.

§ IV. Igitur poſt libros quinquaginta Digeſtorum, ſeu Pandectarum, (in quibus omne jus antiquum collectum eſt, quod per eundem virum excelſum Tribonianum, nec non cæteros viros illuſtres et facundiſſimos, confecimus,) in quatuor libros eaſdem Inſtitutiones partiri juſſimus, ut ſint totius legitimæ ſcientiæ prima elementa.

§ 4. *When therefore, by the aſſiſtence of* Tribonian *and other illuſtrious perſons, we had digeſted the whole antient law into fifty books, called* Digeſts *or* Pandects, *it was our pleaſure, that the Inſtitutions ſhould be divided into four books, which might ſerve as the firſt elements, introductory to the ſcience of the law.*

Quid in Inſtitutionibus contineatur.

§ V. In quibus breviter expoſitum eſt, et quod antea obtinebat, et quod poſtea, deſuetudine inumbratum, imperiali remedio illuminatum eſt.

§ 5. *And, in theſe, we have briefly ſet forth the old laws, which formerly obtained, and thoſe alſo, which for a time have lain dormant, but are now revived by our princely care.*

Ex quibus libris compoſitæ ſunt Inſtitutiones, atque earum recognitio, et confirmatio.

§ VI. Quas ex omnibus antiquorum Inſtitutionibus, et præcipue ex commentariis Caii noſtri, tam inſtitutionum, quam rerum quotidianarum, aliiſque multis commentariis compoſitas, cum tres viri prudentes prædicti nobis obtulerunt, et legimus, et recognovimus, et pleniſſimum noſtrarum conſtitutionum robur eis accommodavimus.

§ 6. *The four books of our Inſtitutions were compiled by* Tribonian, Theophilus, *and* Dorotheus, *from all the inſtitutions of the antient law, but chiefly from the commentaries, inſtitutions, and other writings of* Caius. *And, as ſoon as theſe our Inſtitutions were finiſhed and preſented to us, we read and diligently examined their contents; and, in teſtimony of our approbation, we have now given them a* conſtitutional *authority.*

Adhortatio ad ſtudium juris.

§ VII. Summa itaque ope, et alacri ſtudio, has leges noſtras accipite: et voſmetipſos ſic eruditos oſtendite, ut ipſes vos pulcherrima foveat, toto

legitimo opere perfecto, poſſe etiam noſtram rempublicam, in partibus ejus vobis credendis, gubernari.

D. CP. XI. Kalend. Decemb. *D.* JUSTINIANO *PP. A. III. COS.*

§ 7. *Receive therefore our laws, and ſo profit by them, that, when the courſe of your ſtudies is completely finiſhed, you may with reaſon expect to bear a part in the government, and be inabled to exerciſe thoſe offices, which are committed to your charge.*

Given at *Conſtantinople* on the eleventh day before the calends of *december*, in the third conſulate of the emperor JUSTINIAN, always auguſt.

XI. Kalendas *decemb.*] *i. e.* on the 21ſt day of *november*, in the year of CHRIST, 533.

INSTI-

INSTITUTIONUM,

SEU

ELEMENTORUM,

D. JUSTINIANI

LIBER PRIMUS.

TITULUS PRIMUS.

De JUSTITIA et JURE.

D. 1. T. 1.

Definitio juſtitiæ.

JUSTITIA eſt conſtans et perpetua voluntas jus ſuum cuique tribuendi.

Juſtice is the conſtant and perpetual deſire of giving to every man that, which is due to him.

Definitio juriſprudentiæ.

§ I. Juriſprudentia eſt divinarum atque humanarum rerum notitia, juſti atque injuſti ſcientia.

§ 1. *Juriſprudence is the knowledge of things divine and human, and the exact diſcernment of what is juſt and unjuſt.*

De juris methodo.

§ II. His igitur generaliter cognitis, et incipientibus nobis exponere jura populi Romani, ita videntur poſſe tradi commodiſſime, ſi primo levi ac ſimplici via, poſt deinde diligentiſſima atque exactiſſima interpretatione, ſingula tradantur; alioqui, ſi ſtatim ab initio rudem adhuc et infirmum animum ſtudioſi multitudine ac varietate rerum oneraverimus, duorum alterum, aut deſertorem ſtudiorum efficiemus, aut cum magno labore, ſæpe etiam cum diffidentia, (quam plerumque juvenes avertit,) ſerius ad id perducemus.

perducemus, ad quod, leviore via ductus, ſine magno labore et ſine ulla diffidentia, maturius perduci potuiſſet.

§ 2. *Theſe definitions being premiſed, we ſhall now proceed. But it ſeems right to begin our Inſtitutions in the moſt plain and ſimple manner, altho' afterwards we intend to treat every particular with the utmoſt exactneſs: for, if at firſt we overload the mind of the ſtudent with a variety of things, we may cauſe him either wholly to abandon his ſtudies, or bring him late, thro' a ſeries of labors, to that knowledge, which he might otherwiſe have attained with eaſe and expedition.*

Juris præcepta.

§ III. Juris præcepta ſunt: honeſte vivere, alterum non lædere, ſuum cuique tribuere.

§ 3. *The precepts of the law are theſe: to live honeſtly, not to hurt any man, and to give to every one that, which is his due.*

De jure publico et privato.

§ IV. Hujus ſtudii duæ ſunt poſitiones, publicum et privatum. Publicum jus eſt, quod ad ſtatum rei Romanæ ſpectat. Privatum eſt, quod ad ſingulorum utilitatem pertinet. Dicendum eſt igitur de jure privato, quod tripartitum eſt: collectum enim eſt ex naturalibus præceptis, aut gentium, aut civilibus.

§ 4. *The law is divided into public and private. Public law regards the ſtate of the commonwealth: but private law, of which we ſhall here treat, concerns the intereſt of individuals, and is tripartite, being collected from natural precepts, from the law of nations, and from the civil law of any particular city or ſtate.*

TITULUS SECUNDUS.

De Jure naturali, gentium, et civili.

De jure naturali.

JUS naturale eſt, quod natura omnia animalia docuit: nam jus iſtud non humani generis proprium eſt, ſed omnium animalium, quæ in cœlo, quæ in terra, quæ in mari, naſcuntur. Hinc deſcendit maris atque fœminæ conjunctio, quam nos matrimonium appellamus. Hinc liberorum procreatio, hinc educatio. Videmus enim, cætera quoque animalia iſtius juris peritia cenſeri.

The law of nature is not a law to man only, but likewiſe to all other animals, whether they are produced on the earth, in the air, or in the waters. From hence proceeds the conjunction of male and female, which we among our own ſpecies ſtyle matrimony; from hence ariſes the procreation of children, and our care in bringing them up. We perceive alſo, that the reſt of the animal creation are regarded, as having a knowledge of this law, by which they are actuated.

Cenſeri] Id eſt, æſtimationi ſive admirationi nobis eſſe, ut *Budæus* exponit. [vid. *Roberti Stephani* Theſaur et *Baſilii Fabri* Theſaur. verb. *Cenſeor*.] Sed *Theophilus* hunc locum ita vertit: ὁρωμεν γαρ ὐ μονον ἀνθρωπους, ἀλλα και τα λοιπα ζωα ἐν τοις τιμωσι τεῖον τον νομον ἀναγεγραμμενα. Quaſi hic dictum ſit, non hominem modo, ſed cætera quoque animalia adſcribi et referri ſive recenſeri inter ea, quæ naturæ legem obſervant, ejuſque motu impelluntur. *Mynſinger*.

Diſtinctio juris gentium, et civilis, a definitione et etymologia.

§ I. Jus autem civile a jure gentium diſtinguitur, quod omnes populi, qui legibus et moribus reguntur, partim ſuo proprio, partim communi omnium hominum, jure utuntur: nam, quod quiſque populus ſibi jus conſtituit, id ipſius proprium civitatis eſt; vocaturque jus civile, quaſi jus proprium ipſius civitatis. Quod vero naturalis ratio inter omnes homines conſtituit, id apud omnes gentes peræque cuſtoditur, vocaturque jus gentium, quaſi quo jure omnes gentes utantur. Et populus itaque Romanus partim ſuo proprio, partim communi omnium hominum, jure utitur. Quæ ſingula, qualia ſint, ſuis locis proponemus.

§ 1. *Civil law is diſtinguiſhed from the law of nations, becauſe every community uſes partly it's own particular laws, and partly the general laws, which are common to all mankind. That law, which a people enacts for the government of itſelf, is called the civil law of that people. But that law, which natural reaſon appoints for all mankind, is called the law of nations, becauſe all nations make uſe of it. The people of* Rome *are governed partly by their own laws, and partly by the laws, which are common to all men. But we propoſe to treat ſeparately of theſe laws in their proper places.*

Ab appellatione et effectibus.

§ II. Sed jus quidem civile ex unaquaque civitate appellatur, veluti Athenienſium: nam, ſi quis velit Solonis vel Draconis leges appellare jus civile Athenienſium, non erraverit. Sic enim et jus, quo Romanus populus utitur, jus civile Romanorum appellamus, vel jus Quiritum, quo Quirites utuntur: Romani enim a Romulo, Quirites a Quirino, appellantur. Sed, quoties non addimus nomen cujus ſit civitatis, noſtrum jus ſignificamus: ſicuti cum poëtam dicimus, nec addimus nomen, ſubauditur apud Græcos egregius Homerus, apud nos Virgilius. Jus autem gentium omni humano generi commune eſt: nam, uſu exigente et humanis neceſſitatibus, gentes humanæ jura quædam ſibi conſtituerunt: bella etenim orta ſunt, et captivitates ſecutæ, et ſervitutes, quæ ſunt naturali juri contrariæ: jure enim naturali omnes homines ab initio liberi naſcebantur. Et ex hoc jure gentium omnes pene contractus introducti ſunt, ut emptio et venditio, locatio et conductio, ſocietas, depoſitum, mutuum, et alii innumerabiles.

§ 2. *All* civil *laws take their denomination from that city, in which they are eſtabliſhed: it would therefore not be erroneous to call the laws of* Solon *or* Draco *the civil laws of* Athens. *And thus the law, which the* Roman *people make uſe of, is ſtyled the civil law of the* Romans, *or of the* Quirites; *for the* Romans *are alſo called* Quirites *from* Quirinus. *Whenever we mention the words* civil law, *without addition, we emphatically denote our own law; thus the* Greeks, *when they ſay* the poet, *mean* Homer, *and the* Romans Virgil. *The law of nations is common to*

mankind in general: and all nations have framed laws thro' human neceſſity; for wars aroſe, and the conſequences were captivity and ſervitude; both which are contrary to the law of nature; for by that law all men are free. But almoſt all contracts were at firſt introduced by the law of nations; as for inſtance, buying, ſelling, letting, hireing, ſociety, a depoſit, a mutuum, *and others, without number.*

Mutuum.] The word *mutuum* denotes a contract, by which one man gives to another a thing, which conſiſts in weight (as bullion) in number (as money) in meaſure (as wine) upon condition, that the donée ſhall return another thing of the ſame quantity, nature and value, upon demand. This contract is not without its convenience; for lending without intereſt is in many caſes a more uſeful charity, than an abſolute gift. vid. *lib.* 3. *Inſtit. t.* 15.

Diviſio juris in ſcriptum et non ſcriptum; et ſubdiviſio juris ſcripti.

§ III. Conſtat autem jus noſtrum, quo utimur, aut ſcripto, aut ſine ſcripto: ut apud Græcos *των νομων οἱ μεν ἐγγραφοι, οἱ δε ἀγραφοι.* Scriptum autem jus eſt lex, plebiſcitum, ſenatus-conſultum, principum placita, magiſtratuum edicta, reſponſa prudentum.

§ 3. *The* Roman *law is divided, like the* Grecian, *into written and unwritten. The written is ſixfold, and comprehends the laws, the plebiſcites, the decrees of the ſenate, the conſtitutions of princes, the edicts of magiſtrates, and the anſwers of the ſages of the law.*

Conſtat autem.] The laws of *England* are alſo divided into written, and unwritten. The written laws conſiſt of the ſtatutes, which in their original formation are reduced into writing, and confirmed by the king, lords, and commons. The unwritten laws include the common law, and all particular cuſtoms; they are called unwritten, becauſe they had not their origin in writing, and have acquired their binding force by a long and immemorial uſage. But it muſt be obſerved, that the common law, altho' it was not originally conceived in writing, and is therefore properly defined to be *lex non ſcripta*, has nevertheleſs all it's monuments and memorials in writing, by which it is transfered with certainty from one age to another, and without which it would ſoon loſe all kind of authority. See *Hale's Hiſt. of the Law, cap.* 2.

De lege et plebiſcito.

§ IV. Lex eſt, quod populus Romanus, ſenatorio magiſtratu interrogante, (veluti conſule,) conſtituebat. Plebiſcitum eſt, quod plebs, plebeio magiſtratu interrogante, (veluti tribuno,) conſtituebat. Plebs autem a populo eo differt, quo ſpecies a genere; nam appellatione populi univerſi cives ſignificantur, connumeratis etiam patriciis et ſenatoribus. Plebis autem appellatione, ſine patriciis et ſenatoribus, cæteri cives ſignificantur. Sed et plebiſcita, lege Hortenſia lata, non minus valere, quam leges, cœperunt.

§ 4. *A law is what the* Roman *people enact at the requeſt of a ſenatorial magiſtrate; as for inſtance, at the requeſt of a conſul. A plebiſcite is what the commonalty enact, when requeſted by a plebeian magiſtrate, as by a tribune. The word commonalty differs from people, as a ſpecies from it's genus; for all the citizens, including patricians and ſenators, are comprehended under the term people. The term commonalty includes all the citizens, except patricians and ſenators. The plebiſcites, by the* Hortenſian *law, began to have the ſame force, as the laws themſelves.*

Lege Hortenſia lata.] The law *Hortenſia* was made by *Hortenſius*, the dictator, in the year *U. C.* 467. But it appears to have been only decreed in confirmation of the law *Horatia*, which was enacted in the 304th year of *Rome*, when *Horatius* and *Valerius* were conſuls.

De

De ſenatus-conſulto.

§ V. Senatus-conſultum eſt, quod ſenatus jubet atque conſtituit: nam, cum auctus eſſet populus Romanus in eum modum, ut difficile eſſet in unum eum convocari legis ſanciendæ cauſa, æquum viſum eſt, ſenatum vice populi conſuli.

§ 5. *A ſenatorial decree is what the ſenate commands and appoints: for, when the people of* Rome *were increaſed to a degree, which made it difficult for them to aſſemble for the enacting of laws, it ſeemed but right, that the ſenate ſhould be conſulted inſtead of the whole body of the people.*

Cum auctus eſſet populus.] The *ſenatus-conſulta* obtained the force of laws under the emperor *Tiberius*, who, pretending that the body of the people was too numerous to be aſſembled in one place, referred the whole legiſlative power of the commonalty to the ſenate.

De conſtitutione.

§ VI. Sed et quod principi placuit, legis habet vigorem: cum lege regia, quæ de ejus imperio lata eſt, populus ei, et in eum, omne imperium ſuum et poteſtatem concedat. Quodcunque ergo imperator per epiſtolam conſtituit, vel cognoſcens decrevit, vel edicto præcepit, legem eſſe conſtat. Hæc ſunt, quæ conſtitutiones appellantur. Plane ex his quædam ſunt perſonales, quæ nec ad exemplum trahuntur, quoniam non hoc princeps vult: nam quod alicui ob meritum indulſit, vel ſi quam pœnam irrogavit, vel ſi cui ſine exemplo ſubvenit, perſonam non tranſgreditur. Aliæ autem, cum generales ſint, omnes procul-dubio tenent.

§ 6. *The conſtitution of the prince hath alſo the force of a law; for the people by a law, called* lex regia, *make a conceſſion to him of their whole power. Therefore whatever the emperor ordains by reſcript, decree, or edict, it is a law. Theſe acts are called conſtitutions. Of theſe, ſome are perſonal, and are not to be drawn into precedent; for, if the prince hath indulged any particular man upon account of his merit, or inflicted any extraordinary puniſhment on a criminal, or granted him ſome unprecedented indulgence, theſe acts extend not to others in the like circumſtances. But other conſtitutions are general, and undoubtedly bind all people.*

Lege regia.] There has been much controverſy concerning this law; vid. *Grav. de Rom. imp. lib. ſing. c.* 24. *et Hopp. in inſt.* 1. *h. t.* But the following ſeems at leaſt to be a probable conjecture. The ſenate and people conferred various honors upon *Auguſtus* at different times: in the year of *Rome* 724, they made him tribune for life; in 727, they exempted him from the coercion of the laws; in 731, he was created perpetual conſul; and, in the year 735, a power was given him either of amending or making whatever laws he thought proper. Theſe and other decrees, made in favor of *Auguſtus*, were afterwards generally renewed at the commencement of the reign of every new emperor, as appears plainly from *Tacitus*, *tum ſenatus omnia principibus ſolita Veſpaſiano decrevit.* Tacit. *hiſt.* 11. 3. Thus, in time, all the ſeveral decrees of the ſenate, by being frequently renewed together, became as it were one law, and were called *lex imperii*, or *regia*; and they probably gained this title in imitation of the antient *lex regia*, by which the firſt *Romans* conferred the ſupreme power upon *Romulus* in the infancy of their ſtate. *Liv. lib.* 34. c. 6. *Elementa jur. per Robert Eden*, pag. 17.

De jure honorario.

§ VII. Prætorum quoque edicta non modicam obtinent juris auctoritatem. Hoc etiam jus honorarium ſolemus appellare: quod, qui honores gerunt, (id eſt, magiſtratus,) auctoritatem huic juri dederunt. Proponebant et ædiles curules edictum de quibuſdam cauſis; quod et ipſum juris honorarii portio eſt.

§ 7. *The edicts of the prætors are alſo of great authority. Theſe edicts are called the honorary law, becauſe thoſe, who bear honors in the ſtate, have given them their ſanction. The curule ædiles alſo, upon certain occaſions, publiſhed their edicts, which became a part of the* jus honorarium.

De reſponſis prudentum.

§ VIII. Reſponſa prudentum ſunt ſententiæ et opiniones eorum, quibus permiſſum erat de jure reſpondere: nam antiquitus conſtitutum erat, ut eſſent, qui jura publicè interpretarentur, quibus à Cæſare jus reſpondendi datum eſt, qui juris-conſulti appellabantur: quorum omnium ſententiæ et opiniones eam auctoritatem tenebant, ut judici recedere à reſponſis eorum non liceret, ut eſt conſtitutum.

§ 8. *The anſwers of the lawyers are the opinions of thoſe, who were authoriſed to give their anſwers concerning matters of law. For antiently there were perſons, who publicly interpreted the law; and to theſe the emperors gave a licence for that purpoſe. They were called* juris-conſulti, *and their opinions obtained ſo great an authority, that it was not in the power of a judge to recede from them.*

Reſponſa prudentum.] All thoſe, whoſe particular application and abilities had rendered them learned in the law, undertook to give anſwers to all queſtions, which were propoſed to them. But theſe anſwers were of no weight in the time of the republic, nor even under *Auguſtus*, who impowered the lawyers to give their opinions by a general commiſſion, which yet did not procure them any great authority. *ff.* 1. *t.* 2. *de orig. jur.* But their opinions afterwards grew into conſiderable credit in the reign of *Tiberius*, who prohibited any perſon from preſuming to give an opinion in matters of law, without a ſpecial licence. But ſtill the anſwers of the lawyers had not the force of laws; for *Tiberius*, in his licences, laid not any injunction upon his judges to regard theſe anſwers. It is therefore highly probable, that the anſwers of the lawyers were firſt conſidered as law, under *Valentinian the third*, becauſe he confirmed the writings of *Gaius*, *Ulpian*, *Paul*, *Papinian*, and others nominally, and forbad the judges to ſwerve from the opinions of theſe lawyers in points of law. And, becauſe many inconveniences aroſe from the various opinions, which even theſe lawyers gave upon the ſame queſtion, the emperor ordained, that the judges ſhould be governed by a majority, and that, in caſe of an equality, they ſhould follow the opinion of thoſe, to whom *Papinian* adhered. *Ubi diverſæ ſententiæ proferuntur, potius numerus vincat auctorum: vel, ſi numerus æqualis ſit, ejus partis præcedat auctoritas, in qua excellentis ingenii vir* Papinianus *emineat.* Cod. 1. *Theod.* t. 4. l. un. *De reſponſis prudentum.*

De jure non ſcripto.

§ IX. Sine ſcripto jus venit, quod uſus approbavit; nam diuturni mores, conſenſu utentium comprobati, legem imitantur.

§ 9. *The unwritten law is that, which uſage has approved: for all cuſtoms, which are eſtabliſhed by the conſent of thoſe, who uſe them, obtain the force of a law.*

Ratio

Ratio ſuperioris diviſionis.

§ X. Et non ineleganter in duas ſpecies jus civile diſtributum eſſe videtur; nam origo ejus ab inſtitutis duarum civitatum, Athenarum ſcilicet et Lacedæmoniorum, fluxiſſe videtur. In his enim civitatibus ita agi ſolitum erat, ut Lacedæmonii quidem ea, quæ pro legibus obſervabant, memoriæ mandarent: Athenienſes vero ea, quæ in legibus ſcripta comprehendiſſent, cuſtodirent.

§ 10. *The diviſion of the law, into written and unwritten, ſeems to have taken riſe from the peculiar cuſtoms of the* Athenians *and* Lacedemonians. *For the* Lacedemonians *truſted chiefly to memory, for the preſervation of their laws; but the laws of the* Athenians *were committed to writing.*

Diviſio juris in immutabile et mutabile.

§ XI. Sed naturalia quidem jura, quæ apud omnes gentes peræque obſervantur, divina quadam providentia conſtituta, ſemper firma atque immutabilia permanent. Ea vero, quæ ipſa ſibi quæque civitas conſtituit, ſæpe mutari ſolent, vel tacito conſenſu populi, vel alia poſtea lege lata.

§ 11. *The laws of nature, which are obſerved by all nations, inaſmuch as they are the appointment of divine providence, remain conſtantly fixed and immutable. But thoſe laws, which every city has enacted for the government of itſelf, ſuffer frequent changes, either by tacit conſent, or by ſome ſubſequent law, repealing a former.*

De objectis juris.

§ XII. Omne autem jus, quo utimur, vel ad perſonas pertinet, vel ad res, vel ad actiones. Et prius de perſonis videamus: nam parum eſt jus nôſſe, ſi perſonæ, quarum cauſa conſtitutum eſt, ignorentur.

§ 12. *The laws, which we make uſe of, have relation either to perſons, things, or actions. We muſt therefore firſt treat of perſons; for it would be to little purpoſe to aim at knowledge in the law, while we are ignorant of perſons, on whoſe ſole account the law was conſtituted.*

TITULUS TERTIUS.

De Jure Perſonarum.

D. 1. T. 5.

Prima diviſio perſonarum.

SUMMA itaque diviſio de jure perſonarum hæc eſt: quod omnes homines aut liberi ſunt, aut ſervi.

The firſt general diviſion of perſons, in reſpect to their rights, is into freemen and ſlaves.

Homines aut liberi ſunt, aut ſervi.] Tenure in villenage was formerly a common tenure in *England*, and thoſe, who held by it, were called villeins, from the word *villa*, a farm. They were obliged to perform the moſt ſervile offices, and their condition did not differ from that of ſlaves; for both they and their children were the abſolute property of their lords, who might leaſe them out to others for years, or for life, or make an abſolute ſale of them.

Of villeins there were two ſorts, *viz.* villeins *regardant* to a manor, and villeins *in groſs*.

Villeins *regardant*, or *glebæ adſcriptitii*, were bound to their lord as members, belonging and annexed to the manor, of which their lord was the owner. Villeins *in groſs* were ſuch, who were not appendent to any manor, or lands, but belonged ſolely to the perſon of their lord, and his heirs. And note, a villein might become a villein *in groſs* by preſcription, by being granted away, or by confeſſion.

Tenures in villenage were wholly taken away by a ſtatute in the 12th Year of *Charles the ſecond*, by which all tenures were turned into free and common ſocage: but it is obſervable, that long before this act, in which no notice is taken of villeins *in groſs*, there were very few villeins in *England*; for the laſt caſe concerning villenage to be found in any of the law books is that of *Crouche* in the 10th year of Q. *Elizabeth*. *Dyer* 266. *b. pl.* 11.

And it is remarkable, that Sir *Thomas Smith*, who was one of the principal ſecretaries of ſtate, firſt to King *Edward the ſixth*, and afterwards to Q. *Elizabeth*, writes thus in his republic, "that "he never knew of any villeins *in groſs* in his "time, and that villeins appendent to manors "were but very few in number: that, ſince *Eng-* "*land* has received the chriſtian religion, men "began to be affected in their conſciences at "holding their brethren in ſervitude; and "that upon this ſcruple in proceſs of time the "holy fathers, monks, and friars, ſo burdened "the minds of thoſe, whom they confeſſed, "that temporal men were glad to manumit all "their villeins.

But he adds— "That the holy fathers them- "ſelves did not manumit their own ſlaves; and "that the biſhops behaved like the other eccle- "ſiaſtics; but at laſt ſome biſhops infranchiſed "their villeins for money, and others on account "of popular outcry; and that at length the mo- "naſteries, falling into lay hands, were the oc- "caſion, that almoſt all the villeins in the king- "dom are now manumitted." *Smith's republic, cap.* 10.

But it muſt not here be omitted, that even now, upon a preſumption of neceſſity, the *Engliſh* permit ſlavery in the plantations; and this may lead the reader to inquire, whether a *Negro*, brought into *England*, where ſlaves are certainly not neceſſary, ſhall ſtill continue to be a ſlave, and be recoverable at law, if he quits the ſervice of his maſter? As to this queſtion, it ſeems to be a ſettled point, that an action of trover will not lie for a *Negro*, becauſe the owner has not an abſolute property in his *Negro*, ſo as to kill him, as he could an ox. *Salk.* 666. *Smith* v. *Gould.* Lord *Raymond*, 1274. And there has been ſome doubt as to an action of treſpaſs, but the more prevalent and better opinion is, that a ſpecial action of treſpaſs, *per quod ſervitium amiſit*, will lie in favor of a maſter; ſo that, if property in a *Negro* can be fully proved, he will not be able to maintain his liberty by baptiſm, or reſidence in *England*.

But how much more noble and inlarged is the opinion of *Monteſquiou*, in his *Eſprit des loix*, who denies, with great force of argument, that ſlavery can any where be neceſſary; and indeavours to convince us by a fine irony, that it can never be juſtified.

"The moſt laborious works (ſays that great "author) may be performed by freemen; and "my reaſon for thinking ſo is, that before chriſ- "tianity had aboliſhed civil ſlavery in *Europe*, the "working of mines was thought to be too hard "a labor for any, except ſlaves or criminals: "yet freemen are now employed in theſe very "works, and are known to live happily; as in "the mines of *Hartz* in lower *Saxony*, and in "thoſe of *Hungary*. In ſhort, no labor is ſo "heavy, but it may be proportioned to the "ſtrength of the workman; and the violent fa- "tigues, which ſlaves are made to undergo, may "be greatly eaſed by commodious machines, "invented by art, and ſkillfully applied. The "*Turkiſh* mines in the bannat of *Temeſwar*, tho' "richer than thoſe of *Hungary*, yet produced "not ſo much, and for this plain reaſon, that "the invention of the *Turks* extended no far- "ther, than the ſtrength of their ſlaves. I know "not whether this article is dictated by my un- "derſtanding, or my heart; but I am induced to "think, that there is not a climate upon earth, "where the moſt laborious ſervices might not "be performed by freemen.

"And were I to vindicate our right to make "ſlaves of *Negroes*, theſe ſhould be my arguments.

"The *Europeans*, having exterminated the *Ame* "*ricans*, were forced to make ſlaves of the *Afri-* "*cans*, to clear ſuch vaſt Tracts of land.

"Sugar would be too dear, if the plants, which "produce it, were not cultivated by ſlaves.

"They are ſo black from head to foot, and "ſo very flat-noſed, that it is impoſſible to pity "them.

"It is incredible, that God, who is a wiſe "Being, ſhould place a ſoul, and eſpecially a "good ſoul, in ſo black a body.

"It

" It is alſo a manifeſt proof of their want of " common ſenſe, that they preſer a glaſs neck- " lace to one made of gold, which is a metal of " ſuch great conſequence among all polite na- " tions.

" And, in fine, it is impoſſible to ſuppoſe thoſe " creatures to be men; for, in ſuppoſing them " ſuch, we muſt begin to ſuſpect, that we our- " ſelves are not chriſtians." *Book* 15. *cap.* 5. 8.

Definitio libertatis.

§ I. Et libertas quidem (ex qua etiam liberi vocantur) eſt naturalis facultas ejus, quod cuique facere libet, niſi quid vi aut jure prohibetur.

§ 1. *Liberty, or freedom, from which we are denominated free, is that natural power, which we have of acting, as we pleaſe, if not hindered by force, or reſtrained by the law.*

Definitio ſervitutis.

§ II. Servitus autem eſt conſtitutio juris gentium, qua quis dominio alieno contra naturam ſubjicitur.

§ 2. *Slavery is that, by which one man is made ſubject to another, according to the law of nations, tho' contrary to natural right.*

Servi et mancipii etymologia.

§ III. Servi autem ex eo appellati ſunt, quod imperatores captivos vendere, ac per hoc ſervare, nec occidere ſolent; qui etiam mancipia dicti ſunt, eo, quod ab hoſtibus manu capiantur.

§ 3. *Slaves are denominated* ſervi, *from the verb* ſervare, *to preſerve: for it is the practice of our generals to ſell their captives, being accuſtomed to preſerve, and not to deſtroy them. Slaves are alſo called* mancipia (a manu capere) *in that they are taken by the hand of the enemy.*

Imperatores captivos.] At this day, priſoners, taken in war between chriſtian princes, are not ſold, or even forced to work, but remain, 'till they are either exchanged or ranſomed. Priſoners are alſo treated with the ſame lenity by mahometan princes, when they are at war among themſelves. *Molloy de jure mar.* 419.

Nec occidere ſolent.] vid. *Eſprit des loix.* lib. 15. cap. 2.

Quibus modis ſervi conſtituuntur.

§ IV. Servi autem aut naſcuntur, aut fiunt. Naſcuntur ex ancillis noſtris: fiunt aut jure gentium, id eſt, ex captivitate; aut jure civili, cum liber homo, major viginti annis, ad pretium participandum ſeſe venundari paſſus eſt.

§ 4. *Slaves are either born ſuch, or become ſo. They are born ſlaves, when they are the children of bond-women: and they become ſlaves, either by the law of nations, that is, by captivity; or by the civil law, which happens, when a free perſon, above the age of twenty, ſuffers himſelf to be ſold, for the ſake of ſharing the price given for him.*

Naſcuntur ex ancillis.] " Eodem jure ex an- " cillis nati ſervi ſunt, quo ſata cedunt ſolo; " mater enim ſolo comparatur, vis patris ſato." *Cujacius.*

Cum liber homo.] Altho' abſolute ſlavery is now diſuſed in *Europe* (except when it is inflicted upon criminals, as a puniſhment, or upon *Turks*, when they are priſoners in *Roman* catholic countries) yet a ſpecies of ſervitude is allowed among us, which is juſtifiable: thus an apprentice is bound for a certain time, and for particular purpoſes; and men of full age may alſo, by contract, bind themſelves for a maintenance either for years, or for life. But ſuch a con-

contract, made by the anceſtor, is merely perſonal, and can by no means oblige his poſterity. It muſt be added, that a perſon, bound to another for a term, does not labor under any civil incapacity, but is intituled to all the legal privileges of other men, and, in this, his condition is widely different from that of an abſolute ſlave.

De liberorum et ſervorum diviſione.

§ V. In ſervorum conditione nulla eſt differentia; in liberis autem multæ: aut enim ſunt ingenui, aut libertini.

§ 5. *In the condition of ſlaves there is no diverſity; but among thoſe, who are free, there are many: thus ſome are* ingenui, *others* libertini.

In liberis autem.] Perſons in *Great Britain* are diſtinguiſhed after the following manner.

The nobility, ſtrictly taken, is what makes up the Peerage of *Great Britain*, and conſiſts of lords ſpiritual and temporal, who have a ſeat and vote in parliament, and are divided into five ranks or degrees, *viz.* duke, marquis, earl, viſcount, and baron. All, who are not peers of the kingdom, come under the general name of commoners, who may be diſtinguiſhed into two claſſes: the firſt comprehends the gentry of all denominations, whether baronets, knights, eſquires, or gentlemen. Baronets and knights are made by creation. The honor of baronet is hereditary, and deſcends to the male iſſue. That of a knight-batchelor is only perſonal, and dies with the perſon, upon whom the honor is conferred. The titles of eſquire, and gentleman, are acquired either by birth, by profeſſion, or by certain offices, which diſtinguiſh thoſe, who have ſerved them, and their deſcendents. Under the other claſs may be comprehended the yeomanry, or freeholders, who have lands or tenements of their own to the value of at leaſt forty ſhillings a year; and all citizens, tradeſmen, and day-laborers. *Strahan's Domat. vol.* 1. *p.* 23.

TITULUS QUARTUS.

De Ingenuis.

C. vii. T. 14.

De ingenui definitione.

INgenuus eſt is, qui ſtatim, ut natus eſt, liber eſt; ſive ex duobus ingenuis matrimonio editus eſt, ſive ex libertinis duobus, ſive ex altero libertino, et altero ingenuo. Sed et ſi quis ex matre naſcitur libera, patre vero ſervo, ingenuus nihilominus naſcitur: quemadmodum, qui ex matre libera et incerto patre natus eſt: quoniam vulgo conceptus eſt. Sufficit autem, liberam fuiſſe matrem eo tempore, quo naſcitur, licet ancilla conceperit: et, e contrario, ſi libera conceperit, deinde ancilla facta pariat, placuit eum, qui naſcitur, liberum naſci: quia non debet calamitas matris ei nocere, qui in ventre eſt. Ex his illud quæſitum eſt, ſi ancilla prægnans manumiſſa ſit, deinde ancilla poſtea facta pepererit, liberum an ſervum pariat? Et Martianus probat, liberum naſci: ſufficit enim ei, qui in utero eſt, liberam matrem vel medio tempore habuiſſe, ut liber naſcatur; quod et verum eſt.

The term ingenuous *denotes a perſon, who is free at the inſtant of his birth, by being born in matrimony of parents, who are both* ingenuous, *or both* libertines; *or of parents, who differ in condition, the one being* ingenuous, *and the other a* libertine. *But*

But when the mother is free, altho' the father is a ſlave, or even unknown, the child is ingenuous: *and when the mother is free at the time of the birth of her infant, altho' ſhe was a bond-woman when ſhe conceived it, yet ſuch infant will be* ingenuous. *Alſo if a woman, who was free at the time of conception, is afterwards reduced to ſlavery and delivered of a child, her iſſue is, notwithſtanding this, free born; for the misfortune of the mother ought by no means to prejudice her infant. It has been a queſtion, whether the child of a woman, who is made free during pregnancy, but becomes bond before delivery, would be free born?* Martianus *proves, that the child of ſuch woman would be free: for, in his opinion, it is ſufficient, if the mother hath been free at any time between conception and delivery; and this opinion is ſtrictly true.*

Ex matre libera.] It is a general maxim in the civil law, "that a child, born in lawful "wedlock, ſhall follow the condition of his fa-"ther:" *Cum legitimæ nuptiæ factæ ſunt* [ſays *Celſus*] *liberi patrem ſequuntur.* ff. 1. 5. 19.

But, where there is no lawful marriage, the children then follow the condition of their mother; and this happens, according to the *Roman* law, not only when ſlaves intermarry, but even when a free-man marries a bond-woman, for all ſuch marriages are only called *contubernia:* it therefore follows *a fortiori*, that, if a freeman debauches a bondwoman, their iſſue will be bond. *Liberi ex coitu meretricio ſuſcepti, qui vulgo quæſiti dicuntur, matris conditionem ſequuntur, quia pater eorum ignoratur, quod idem eſt ac ſi patrem non haberent. Liberi ex contubernio, ſive inter ſervos, ſive inter alterum liberum, alterum ſervum, in eadem conditione ſunt, quia jus civile ad eos non pertinet.* vid. gloſſ. et DD. at l. 19. ff. 1. t. 5.

But the rule of the law of *England* is ſtill more general; for the maxim is, "that the children "ſhall never follow the condition of their mo-"ther, but always that of their father." *Lex Angliæ* [ſays *Forteſcue*] *nunquam matris, ſed ſemper patris, conditionem imitari partum judicat.* Forteſc. de laud. *ll.* Angl.

So that, if a villein in *England* had taken a free-woman to wife, their iſſue would have been villeins; and, if a nieſe had been married to a free-man, their children would have been free. *Litt. ten. lib. 2. ſect.* 187.

But the illegitimate iſſue of a villein and a free-woman, or of a villein and a nieſe, would have been free, altho' their iſſue in lawful matrimony would have been bond. For, inaſmuch as a baſtard is not permitted by the law of *England* to follow the condition of his mother, and can not follow the condition of his father, who is unknown to the law, he is therefore feigned to be *nullius filius*; and, in favor of liberty, is preſumed to have been born free.

De erronea ingenui manumiſſione.

§ I. Cum autem ingenuus aliquis natus ſit, non officit ei, in ſervitute fuiſſe, et poſtea manumiſſum eſſe: ſæpiſſime enim conſtitutum eſt, natalibus non officere manumiſſionem.

§ 1. *When any man is by birth* ingenuous, *it will not injure him to have been in ſervitude, and to have been afterwards manumitted: for there are diverſe conſtitutions, by which it is enacted, that manumiſſion ſhall not prejudice free birth.*

Sæpiſſime enim.] For, if manumiſſion was permitted to operate, the perſon manumitted muſt become a *libertine*, which would be injurious to a man, who was free by birth, and manumitted thro' ignorance and miſtake. *Cod.* 7. *t.* 16. *l.* 21.

TITULUS QUINTUS.

De Libertinis.

Definitio et origo libertinorum et manumiſſionis.

LIBERTINI ſunt, qui ex juſta ſervitute manumiſſi ſunt. Manumiſſio autem eſt *de manu datio*: nam quamdiu aliquis in ſervitute eſt, ma-

manui et poteſtati ſuppoſitus eſt: et manumiſſus liberatur a domini poteſtate: quæ res a jure gentium originem ſumpſit; utpote cum jure naturali omnes liberi naſcerentur; nec eſſet nota manumiſſio, cum ſervitus eſſet incognita. Sed, poſtquam jure gentium ſervitus ingenuitatem invaſit, ſecutum eſt beneficium manumiſſionis: et, cum uno communi nomine omnes homines appellarentur, jure gentium tria hominum genera eſſe cœperunt, liberi, et his contrarium, ſervi, et tertium genus, libertini, qui deſierant eſſe ſervi.

Libertines, or free-men, are thoſe, who have been manumitted from juſt ſervitude. Manumiſſion implies the giving of liberty; for whoever is in ſervitude, is ſubject to the hand and power of another; but whoever is manumitted, is free from both.

Manumiſſion took its riſe from the law of nations; for all men by the law of nature are born in freedom; nor was manumiſſion heared of, whileſt ſervitude was unknown. But, when ſervitude, under ſanction of the law of nations, invaded liberty, the benefit of manumiſſion became then a conſequence. For all men at firſt were denominated by one common appellation, 'till, by the law of nations, they began to be divided into three claſſes, viz. *into* liberi, *or thoſe, who are born free; into* ſervi, *or thoſe, who are in ſlavery; and into* libertini, *who are thoſe, who have ceaſed to be ſlaves, by having freedom conferred upon them.*

Quibus modis manumittatur.

§ I. Multis autem modis manumiſſio procedit: aut enim ex ſacris conſtitutionibus in ſacroſanctis eccleſiis, aut vindicta, aut inter amicos, aut per epiſtolam, aut per teſtamentum, aut per aliam quamlibet ultimam voluntatem. Sed et aliis multis modis libertas ſervo competere poteſt, qui tam ex veteribus, quam ex noſtris conſtitutionibus, introducti ſunt.

§ 1. *Manumiſſion is effected by various ways; either in the face of the church, according to the imperial conſtitutions, or by the* vindicta, *or in the preſence of friends, or by letter, or by teſtament, or by any other laſt will. Liberty may alſo be properly conferred upon a ſlave by diverſe other methods, ſome of which were introduced by the conſtitutions of former emperors, and others by our own.*

Multis autem modis.] Liberty could antiently be conferred, but three ways: *viz.* by *teſtament*, by the *cenſus*, and by the *vindicta* or lictor's rod. And this is evident from the following paſſage in *Tully*: *Si neque cenſu, neque vindicta, neque teſtamento liber factus eſt, non eſt liber.* In top.

A man was ſaid to be *liber cenſu*, when his name was inſerted in the cenſor's roll with the approbation of his maſter at the public *cenſus*. But the method of acquiring liberty by the *vindicta* was more ſolemn and formal. For it was neceſſary, that the maſter, placing his hand upon the head of the ſlave, ſhould ſay in the preſence of the prætor, *hunc hominem liberum eſſe volo*, to which the prætor always replied, *dico eum liberum eſſe more Quiritum.* Then the lictor, or ſerjeant, receiving the *vindicta*, or rod, from the prætor, ſtruck the new freed-man ſeveral blows with it upon the head, face, and back, after which his name was regiſtered in the roll of freed-men, and his head being cloſe ſhaved, a cap was given him, as a token of liberty.

The various other forms of manumitting, introduced by the imperial conſtitutions, are almoſt all of a public nature; and even manumiſſion *among friends*, or *by letter*, could not be effected without the preſence of five witneſſes. *Cod. 7. t. 6. de lat. lib. toll.*

With reſpect to villeins in *England*, it appears from the following law, enacted by *William the firſt*, in what manner they were antiently infranchiſed. *Si quis velit ſervum ſuum liberum facere, tradat eum vice comiti per manum dextram in pleno comitatu, quietum illum clamare debet a jugo ſervitutis ſuæ per manumiſſionem, et oſtendat ei liberas vias et portas, et tradat illi libera arma, ſcilicet, lanceam et gladium; deinde liber homo efficitur.* "If "any perſon is willing to infranchiſe his ſlave, "let him, with his right hand, deliver the ſlave to

" to the ſheriff in a full county, proclaim him " exempt from the bond of ſervitude by manu- " miſſion, ſhew him open gates and ways, and " deliver him free arms, to wit, a lance, and a " ſword; after which he commences a free- " man."

Another law, made by king *Henry the firſt*, gives a ſtill farther light into this matter. *Qui ſervum ſuum liberat in eccleſia, vel mercato, vel comitatu, vel hundredo coram teſtibus, et palam faciat, et liberas illi vias et portas conſcribat apertas, et lanceam, et gladium, vel quæ liberorum arma ſunt in manibus ei ponat.* vid. *ll.* Anglo-Saxonicas, *&c.* Wilkins editore.

But theſe ceremonies were diſuſed in *England* by the more modern practice, and freedom was often conferred by grants, of which the following is a precedent, from whence the reader may collect, what intereſt the lord had in his villein, by obſerving how great an intereſt is releaſed.

To all to whom theſe preſents ſhall come, &c. T. L. *lord of the manor of* D. *ſendeth greeting.* Whereas A. B. *otherwiſe called our native, ſon of* C. B. *otherwiſe called* C. B. *our native, belonging and appendent to our manor of* D. *in the county of* E. *was begotten in villenage, and for ſuch a one was commonly called, held, had, and reputed openly, publickly, and privately*; Know ye, *that I the ſaid* T. L. *for diverſe good and lawful cauſes me thereunto moving, for me and my heirs for ever, have manumitted, releaſed, and from the yoke of ſervitude and villenage diſcharged, and, by theſe my* letters patent, *do manumit, free, and diſcharge the ſaid* A. B. *with all his ſequels begotten, or to be begotten, with all his goods and chattels, lands and tenements by him already bought, or hereafter to be bought whatſoever.* Know ye *alſo, that I the ſaid* T. L. *have remiſed, and releaſed, and for me, my heirs*, &c. *have quiet clamed, and by this my preſent writing do remit, releaſe, and quiet clame the ſaid* A. B. *and his heirs, and all his ſequels, from all, and all manner of actions real, and perſonal, ſuits, quarrels*, &c. *which againſt the ſaid* A. B. *or any of the heirs of his ſequels, or any of them, I have, or had, or which I, or my heirs hereafter, might have by reaſon of the ſaid ſervitude aforeſaid, or for any other cauſe whatſoever, from the beginning of the world unto the day of making theſe preſents. So that neither I the ſaid* T. L. *nor my heirs, nor any other by and for us, or in our names, any action, right, title, clame, intereſt, or demand of villenage or ſervitude, by the king's writ, or by any other means whatſoever againſt the ſaid* A. B. *or his ſequels begotten, or to be begotten, or againſt the goods, chattels, lands and tenements purchaſed, or hereafter to be purchaſed, from henceforth may exact, clame, or challenge, at any time hereafter, but that we be wholly and for ever thereof debarred by theſe preſents.* And I *the ſaid* T. L. *and my heirs, the ſaid* A. B. *with all his ſequels begotten, or to be begotten, free-men, againſt all men, will warrant for ever by theſe preſents. In witneſs*, &c. *vid.* the complete clerk, reprinted in 1676.

Per aliam quamlibet.] By the words *per aliam quamlibet ultimam voluntatem,* are meant donations *mortis cauſa*, and codicils.

Aliis multis modis.] Many of which are enumerated in Cod. 7. t. 6. *De latina libertate tollenda.*

Ubi et quando manumitti poteſt.

§ II. Servi vero a dominis ſemper manumitti ſolent, adeo ut vel in tranſitu manumittantur; veluti cum prætor, aut præſes, aut proconſul, in balneum, vel in theatrum eunt.

§ 2. *Slaves may be manumitted by their maſters at any time, even whileſt the prætor, the governor of a province, or the proconſul is going to the baths, or to the theater.*

Veluti cum prætor.] For infranchiſement is an act of voluntary, and not of contentious, juriſdiction; ſo that time and place are not material. See *Cod.* 3. *t.* 12. *ll.* 2, 8.

Omnes proconſules ſtatim, quam urbem egreſſi fuerint, habent juriſdictionem; ſed non contentioſam, ſed voluntariam; ut ecce manumitti apud eos poſſunt tam liberi quam ſervi, et adoptiones fieri. ff. 1. t. 16. *l.* 2.

De libertinorum diviſione ſublata.

§ III. Libertinorum autem ſtatus tripertitus antea fuerat: nam qui manumittebantur, modo majorem et juſtam libertatem conſequebantur, et fiebant cives Romani: modo minorem, et Latini ex lege Junia Norbana fiebant: modo inferiorem, et fiebant ex lege Ælia Sentia Dedititii: ſed quoniam Dedititiorum quidem peſſima conditio jam ex multis tempo-

ribus in desuetudinem abierat; Latinorum vero nomen non frequentabatur; ideoque nostra pietas, omnia augere et in meliorem statum reducere desiderans, duabus constitutionibus hoc emendavit, et in pristinum statum reduxit: quia et a primis urbis Romæ cunabulis una atque simplex libertas competebat, id est, eadem, quam habebat manumissor; nisi quod, scilicet, libertinus sit, qui manumittitur, licet manumissor ingenuus sit. Et Dedititios quidem per constitutionem nostram expulimus, quam promulgavimus inter nostras decisiones; per quas, suggerente nobis Triboniano viro excelso quæstore nostro, antiqui juris altercationes placavimus. Latinos autem Junianos, et omnem, quæ circa eos fuerat, observantiam, alia constitutione, per ejusdem quæstoris suggestionem, correximus, quæ inter imperiales radiat sanctiones. Et omnes libertos (nullo, nec ætatis manumissi, nec domini manumittentis, nec in manumissionis modo, discrimine habito, sicuti antea observabatur) civitate Romana decoravimus, multis modis additis, per quos possit libertas servis cum civitate Romana, quæ sola est in præsenti, præstari.

§ 3. *The* libertini *were formerly distinguished by a threefold division. Those, who were manumitted, sometimes obtained what was called the greater liberty, and thus became* Roman *citizens*; *sometimes they obtained only the lesser liberty, and became* Latins, *according to the law* Junia Norbana; *and sometimes they obtained only the inferior liberty, and became* Dedititii, *by the law* Ælia Sentia. *But, the condition of the* Dedititii *differing but little from slavery, the inferior liberty has been long since disused; neither has the name of* Latins *been frequent. It therefore being our ardent desire to extend our bounty, and to reduce all things into a better state, we have amended our laws by two constitutions, and re-established the antient usage; for antiently liberty was simple and undivided, that is, it was conferred upon the slave, as his manumittor possessed it, admitting this single difference, that the person manumitted became only a* libertine, *altho' his manumittor was* ingenuous.

We have intirely abolished the name of Dedititii *by a constitution published among our decisions, by which, at the instance of* Tribonian, *our quæstor, we have suppressed all disputes concerning the antient law. We have also, at the suggestion of the same illustrious person, altered the condition of the* Latins, *and corrected the laws, which related to them, by another constitution, which eminently distinguishes itself among the imperial sanctions. And we have made all the freed-men in general citizens of* Rome, *regarding neither the age of the person manumitted, nor of the manumittor, nor any of the forms of manumission, as they were antiently observed. We have also introduced many new methods, by which slaves may become* Roman *citizens; and the liberty of becoming such is that alone, which can now be conferred.*

Latini ex lege Junia Norbana.] The law *Junia Norbana* was made *Anno U. C.* 771, in the consulship of *Junius Silanus* and *Norbanus Balbus*. It was enacted by this law, that all slaves, who were infranchised otherwise than by testament, the *census*, or the *vindicta*, should not become *Roman* citizens, but have such privileges only, which the *Latins* enjoyed before the *Italian*, or social war. The condition of those, who obtained this lesser liberty, is thus described by *Justinian*: *ut liberi vitam suam peragebant, attamen sub ultimo spiritu simul animam atque libertatem amittebant, et quasi servorum, ita bona eorum, jure quodammodo peculii, ex lege Junia Norbana manumissores detinebant.* Inst. 3. t. 8. But it must be observed, that they were not prohibited from enjoying the freedom of *Rome*, if properly conferred.

Ex lege Ælia Sentia Dedititii.] By the law *Ælia Sentia*, which was enacted in the reign of *Augustus*, and in the consulate of *Ælius* and *Sentius*, all slaves, who had been condemned, as criminals,

nals, and afterwards obtained manumiſſion thro' the indulgence of their maſters, could only acquire the inferior liberty, and were termed *Dedititii*, becauſe their condition was equalled with that of conquered revolters, whom the *Romans*, in reproach, called *Dedititii, Quia ſe ſuaque omnia dediderunt*.

Theſe inferior freed-men were diſtinguiſhed from the *Latins* by many incapacities peculiar to themſelves, the moſt remarkable of which was, that they were for ever debarred from becoming citizens of *Rome*. But theſe diſtinctions were deſtroyed by the conſtitutions of *Juſtinian*. vid. Cod. 7. t. 5. l. 1. t. 6. l. 1.

TITULUS SEXTUS.

Qui et ex quibus cauſis manumittere non poſſunt.

D. xl. T. 9. C. vii. T. 11.

Prius caput legis Æliæ Sentiæ, de manumittente in fraudem creditorum.

NON tamen cuicumque volenti manumittere licet: nam is, qui in fraudem creditorum manumittit, nihil agit: quia lex Ælia Sentia impedit libertatem.

It is not in the power of every maſter to manumit at will: for whoever manumits with intent to defraud his creditors, may be ſaid to commit a nullity, the law Ælia Sentia *impeding all liberty thus granted.*

De ſervo inſtituto cum libertate.

§ I. Licet autem domino, qui ſolvendo non eſt, in teſtamento ſervum ſuum cum libertate hæredem inſtituere, ut liber fiat, hæreſque ei ſolus et neceſſarius, ſi modo ei nemo alius, ex eo teſtamento, hæres extiterit: aut quia nemo hæres ſcriptus ſit, aut quia is, qui ſcriptus eſt, qualibet ex cauſa hæres ei non extiterit. Idque eadem lege Ælia Sentia proviſum eſt, et recte. Valde enim proſpiciendum erat, ut egentes homines, quibus alius hæres extiturus non eſſet, vel ſervum ſuum neceſſarium hæredem haberent, qui ſatisfacturus eſſet creditoribus: aut, hoc eo non faciente, creditores res hæreditarias ſervi nomine vendant, ne injuria defunctus afficiatur.

§ 1. *A maſter, who is inſolvent, may appoint a ſlave to be his heir with liberty, that thus the ſlave may obtain his freedom, and become the only and neceſſary heir of the teſtator, on ſuppoſition that no other perſon is alſo heir by the ſame teſtament; and this may happen, either becauſe no other perſon was inſtituted heir, or becauſe the perſon, ſo inſtituted, is unwilling to act, as ſuch. This privilege of maſters was for wiſe and juſt reaſons eſtabliſhed by the above-named law* Ælia Sentia: *for it claimed a ſpecial proviſion, that indigent men, to whom no man would be a voluntary heir, might have a ſlave for a neceſſary heir to ſatisfy creditors; or otherwiſe, that the*

creditors themſelves ſhould make ſale of the hereditary effects of the maſter in the name of the ſlave, leſt the deceaſed ſhould ſuffer ignominy.

Ne injuria.] "Hoc eſt, ignominia; quamvis "enim edicto prætoris de infamibus non note- "tur, oneratur tamen exiſtimatio ejus, et facti "infamiam non effugit is, cujus bona auctioni "et haſtæ publice ſubjiciuntur; cujus rei locu- "pletem teſtem habemus *Ciceronem* pro *Quintio*, "cap. 15. vid. *Vinn.*

De ſervo inſtituto ſine libertate.

§ II. Idemque juris eſt, etſi ſine libertate ſervus hæres inſtitutus eſt: quod noſtra conſtitutio non ſolum in domino, qui ſolvendo non eſt, ſed generaliter conſtituit, nova humanitatis ratione: ut ex ipſa ſcriptura inſtitutionis etiam libertas ei competere videatur: cum non ſit veriſimile, eum, quem hæredem ſibi elegit, ſi prætermiſerit libertatis dationem, ſervum remanere voluiſſe, et neminem ſibi hæredem fore.

§ 2. *A ſlave alſo becomes free by being inſtituted an heir, altho' no mention was made of liberty in the teſtament: for our imperial conſtitution regards not only maſters, who are inſolvent, but, by a new act of our humanity, it extends generally; ſo that the very inſtitution of an heir implies the conferring of liberty. For it is highly improbable, that a teſtator, altho' he hath omitted to mention liberty in his teſtament, would be willing, that the perſon, whom he hath inſtituted, ſhould remain in ſervitude, ſince a teſtator would thus defeat his own purpoſe, and be deſtitute of an heir.*

Quod noſtra conſtitutio.] See *Cod.* 6. *t.* 27. *l.* 5. De neceſſariis hæredibus inſtituendis.

Quid ſit in fraudem creditorum manumittere.

§. III. In fraudem autem creditorum manumittere videtur, qui vel jam eo tempore, quo manumittit, ſolvendo non eſt; vel qui, datis libertatibus, deſiturus eſt ſolvendo eſſe. Prævaluiſſe tamen videtur, niſi animum quoque fraudandi manumiſſor habuerit, non impediri libertatem, quamvis bona ejus creditoribus non ſufficiant: ſæpe enim de facultatibus ſuis amplius, quam in his eſt, ſperant homines. Itaque tunc intelligimus impediri libertatem, cum utroque modo fraudantur creditores, id eſt, et conſilio manumittentis, et ipſa re, eo quod bona ejus non ſunt ſuffectura creditoribus.

§ 3. *A man may be ſaid to manumit in order to defraud creditors, if he is inſolvent at the time when he manumits, or if he becomes inſolvent by manumitting. It is however the prevailing opinion, that liberty, when granted, is not impeached, unleſs the manumittor had an intent to defraud, altho' his goods are inſufficient for the payment of his creditors; for men frequently imagine themſelves to be in better circumſtances, than they really are. We therefore underſtand liberty to be then only impeded, when creditors are doubly defrauded; that is, both by the intention of the manumittor, and in reality.*

Alterum caput legis Æliæ Sentiæ de minore viginti annis.

§ IV. Eadem lege Ælia Sentia, domino minori viginti annis non aliter manumittere permittitur, quam ſi vindicta apud conſilium, juſta cauſa manumiſſionis approbata, fuerint manumiſſi.

§ 4.

§ 4. *By the before-named law* Ælia Sentia, *a maſter, under the age of twenty years, can not manumit, unleſs a juſt cauſe is aſſigned, which muſt be approved of by a council, appointed for that purpoſe, at whoſe command liberty is conferred by the* vindicta.

Non aliter.] This prohibition was in favor of minors; "ne, ſervorum ſuorum delinimentis "decepti, minores rebus ſuis ſpoliarentur; præ-"terea lex providere voluit, ne temere, et ſine "certo animi judicio, ſervi libertate et civitate "donarentur." *ff.* 40. *t.* 2. *l.* 4. *et paſſim.*

Apud concilium.] This council at *Rome* conſiſted of the prætor, five ſenators, and five *equites* or knights. In the provinces it conſiſted of the proconſul, and twenty *recuperatores*, i. e. magiſtrates of municipal towns, who were called *recuperatores, quia jus ſuum per eos quiſque recuperabat*. Calvin.

Quæ ſunt juſtæ cauſæ manumiſſionis.

§ V. Juſtæ autem cauſæ manumiſſionis ſunt: veluti ſi quis patrem aut matrem, filium filiamve, aut fratres, ſororeſve naturales, aut pædagogum, aut nutricem, aut educatorem, aut alumnum alumnamve, aut collectaneum manumittat: aut ſervum, procuratoris habendi gratia, aut ancillam, matrimonii habendi cauſa: dum tamen intra ſex menſes in uxorem ducatur, niſi juſta cauſa impediat: et ſervus, qui manumittitur, procuratoris habendi gratia, non minor decem et ſeptem annis manumittatur.

§ 5. *A minor is deemed to aſſign a juſt reaſon for manumiſſion, when he alleges any of the following*, viz. *that the perſon to be manumitted is his father or mother, his ſon or daughter, his brother or ſiſter, his preceptor, his nurſe, his foſter child, or his foſter brother*; *or when he alleges, that he would manumit his ſlave, in order to conſtitute him his proctor*; *or his bond-woman, with an intent to marry her, on condition, that the marriage is performed within ſix months. But a ſlave, who is to be conſtituted a proctor, can not be manumitted for that purpoſe, if he is under ſeventeen.*

Juſtæ autem.] vid. *ff.* 40. *t.* 2. *l.* 9, 10, *&c.*

De cauſa ſemel probata.

§ VI. Semel autem cauſa approbata, ſive vera ſit, ſive falſa, non retractatur.

§ 6. *A reaſon, which has once been admitted in favor of liberty, whether true or falſe, can not afterwards be diſallowed.*

Abrogatio poſterioris capitis legis Æliæ Sentiæ.

§ VII. Cum ergo certus modus munumittendi minoribus viginti annis dominis per legem Æliam Sentiam conſtitutus eſſet, eveniebat, ut qui quatuordecim annos expleverat, licet teſtamentum facere, et in eo ſibi hæredem inſtituere, legataque relinquere, poſſet, tamen, ſi adhuc minor eſſet viginti annis, libertatem ſervo dare non poſſet; quod non erat ferendum: nam, cui totorum ſuorum bonorum in teſtamento diſpoſitio data erat, quare non ſimiliter ei, quemadmodum alias res, ita et de ſervis ſuis in ultima voluntate diſponere, quemadmodum voluerit, permittimus, ut et libertatem eis poſſit præſtare? Sed cum libertas inæſtimabilis res ſit, et propter

hoc

hoc ante vigeſimum ætatis annum antiquitas libertatem ſervo dare prohibebat; ideo nos, mediam quodammodo viam eligentes, non aliter minori viginti annis libertatem in teſtamento dare ſervo ſuo concedimus, niſi ſeptemdecimum annum impleverit, et octodecimum attigerit. Cum enim antiquitas hujuſmodi ætati et pro aliis poſtulare conceſſerit, cur non etiam ſui judicii ſtabilitas ita eos adjuvare credatur, ut ad libertatem dandam ſervis ſuis poſſint pervenire?

§ 7. *When certain bounds were preſcribed by the law* Ælia Sentia *to all under twenty, with regard to manumiſſion, it was obſerved, that any perſon, who was fourteen complete, might make a teſtament, inſtitute an heir, and bequeath legacies, and yet that no perſon, under twenty, could confer liberty; which was not longer to be tolerated. For can any juſt cauſe be aſſigned, why a man, permitted to diſpoſe of all his effects by teſtament, ſhould be debarred from infranchiſing his ſlaves? But, liberty being of ineſtimable value, and our antient laws prohibiting any perſon to make a grant of it, who is under twenty years of age, We therefore make choice of a middle way, and permit all, who are in their eighteenth year, to confer liberty by teſtament. For ſince, by all former practice, perſons at eighteen were permitted to plead for their clients, there is no reaſon, why the ſame ſtability of judgment, which qualifies them to aſſiſt others, ſhould not be of advantage to themſelves, by inabling them to infranchiſe their own ſlaves.*

TITULUS SEPTIMUS.

De lege Fuſia Caninia tollenda.

C. vii. T. 3.

LEGE Fuſia Caninia, certus modus conſtitutus erat in ſervis teſtamento manumittendis; quam, quaſi libertates impedientem et quodammodo invidam, tollendam eſſe cenſuimus: cum ſatis fuerat inhumanum, vivos quidem licentiam habere totam ſuam familiam libertate donare, niſi alia cauſa impediat libertatem; morientibus autem hujuſmodi licentiam adimere.

By the law Fuſia Caninia, *all maſters were reſtrained from manumitting more, than a certain number, by teſtament; but we have thought proper to abrogate this law, as odious and deſtructive of liberty; judging it inhuman, that perſons in health ſhould have power to manumit a whole family, if no juſt cauſe impedes the manumiſſion, and that thoſe, who are dying, ſhould be prohibited from doing the ſame thing by teſtament.*

TITU-

TITULUS OCTAVUS.

De his, qui ſui vel alieni juris ſunt.

D. 1. T. 6.

Altera diviſio perſonarum.

SEQUITUR de jure perſonarum alia diviſio; nam quædam perſonæ ſui juris ſunt, quædam alieno juri ſubjectæ. Rurſus earum, quæ alieno juri ſubjectæ ſunt, aliæ ſunt in poteſtate parentum, aliæ in poteſtate dominorum. Videamus itaque de his, quæ alieno juri ſubjectæ ſunt; nam ſi cognoverimus, quænam iſtæ perſonæ ſunt, ſimul intelligemus, quæ ſui juris ſunt; ac prius inſpiciamus de his, quæ in poteſtate dominorum ſunt.

We now proceed to another diviſion of perſons; for ſome are independent, and ſome are ſubject to the power of others. Of thoſe, who are ſubject to others, ſome are in the power of parents, others in the power of their maſters. Let us then inquire, what perſons are in ſubjection to others; for when we apprehend, who theſe perſons are, we ſhall at the ſame time diſcover thoſe, who are independent. Our firſt inquiry ſhall be concerning thoſe, who are in the power of maſters.

De jure gentium in ſervos.

§ I. In poteſtate itaque dominorum ſunt ſervi, quæ quidem poteſtas juris gentium eſt; nam apud omnes peræque gentes animadvertere poſſumus, dominis in ſervos vitæ neciſque poteſtatem fuiſſe: et, quodcunque per ſervum acquiritur, id domino acquiri.

§ 1. *All ſlaves are in the power of their maſters, which power is derived from the law of nations: for it is equally obſervable among all nations, that maſters have always had the power of life and death over their ſlaves, and that whatſoever is acquired by the ſlave is acquired for the maſter.*

Vitæ neciſque poteſtatem.] This power was abridged by the law *Cornelia de Sicariis, ann. U. C.* 673, and by the law *Petronia de ſervis*, in 813. It was afterwards intirely taken away by the emperor *Adrian*, who enacted, "that ſlaves "ſhould not ſuffer death, unleſs upon con- "viction of ſome capital crime before a ma- "giſtrate."

De jure civium Romanorum in ſervos.

§ II. Sed hoc tempore nullis hominibus, qui ſub imperio noſtro ſunt, licet, ſine cauſa legibus cognita, in ſervos ſuos ſupra modum ſævire. Nam, ex conſtitutione divi Antonini, qui ſine cauſa ſervum ſuum occiderit, non minus puniri jubetur, quam ſi alienum ſervum occiderit. Sed et major aſperitas dominorum, ejuſdem principis conſtitutione, coercetur: nam Antoninus, conſultus a quibuſdam præſidibus provinciarum de his ſervis, qui ad ædem ſacram vel ſtatuam principum confugiunt, præcipit, ut, ſi intolerabilis videatur ſævitia dominorum, cogantur ſervos ſuos bonis conditionibus

nibus vendere, ut pretium dominis daretur; et recte: expedit enim reipublicæ, ne ſua re quis male utatur. Cujus reſcripti, ad Ælium Martianum miſſi, verba ſunt hæc. *Dominorum quidem poteſtatem in ſervos illibatam eſſe oportet, nec cuiquam hominum jus ſuum detrahi. Sed et dominorum intereſt, ne auxilium contra ſævitiam, vel famem, vel intolerabilem injuriam, denegetur iis, qui juſte deprecantur. Ideoque cognoſce de querelis eorum, qui ex familia Julii Sabini ad ſacram ſtatuam confugerunt, et, ſi vel durius habitos, quam æquum eſt, vel infami injuria affectos eſſe, cognoveris, venire jube, ita ut in poteſtatem domini non revertantur. Quod ſi meæ conſtitutioni fraudem fecerit, ſciat, me hoc admiſſum adverſus ſe ſeverius exeturum.*

§ 2. *All perſons, under our imperial government, are now prohibited to inflict any extraordinary puniſhment upon their ſlaves, without a legal cauſe. For, by a conſtitution of* Antoninus, *it is enacted, that whoever kills his own ſlave without a juſt cauſe, is not to be puniſhed with leſs rigor, than if he had killed a ſlave, who was the property of another. The too great ſeverity of maſters is alſo reſtrained by another conſtitution, made by the ſame prince: for* Antoninus, *being conſulted by certain governors of provinces concerning thoſe ſlaves, who took ſanctuary either in temples, or at the ſtatues of the emperors,* Ordained, *that, if the ſeverity of maſters ſhould appear at any time exceſſive, they might be compelled to make ſale of their ſlaves upon equitable terms, ſo that the full worth of ſuch ſlaves might be given to their maſters. And this conſtitution ſeems juſt and reaſonable, inaſmuch as it is a maxim, expedient for the commonwealth, "that no one ſhould be permitted to miſuſe even his own property." The reſcript of this emperor, ſent to* Ælius Martianus, *is conceived in the following words.*—The power of maſters over their ſlaves ought by no means to be wrongfully diminiſhed, neither ought any man to be deprived of his juſt right. But it is for the intereſt of all maſters, that relief againſt cruelties, the denial of ſuſtenance, or any other inſufferable injury, ſhould not be refuſed to thoſe, who juſtly implore it. Therefore take cogniſance of all complaints, made by thoſe of the family of *Julius Sabinus*, whoſe ſlaves took ſanctuary at the ſacred ſtatue, and, if you are made ſenſible of their having been more hardly treated than they ought, or of their having ſuffered any great injury, order them to be forthwith ſold, and in ſuch a manner, that they may never more be made ſubject to their former maſter. And, if *Julius Sabinus* indeavours by any fraud to evade our conſtitution, be it known to him, that ſuch his offence ſhall be puniſhed with the utmoſt rigor.

Ad ſacram ſtatuam.] It was antiently the policy of almoſt all kingdoms to allow of ſanctuaries or places of refuge; and they are ſaid to have been permitted in *England*, almoſt as ſoon as chriſtianity was received. In the 8th year of *Henry the eighth*, the following points (which will give the reader ſome idea of the power of ſanctuaries) were affirmed and reſolved in the caſe of *Savage*;—To wit; that in *England* the pope without the king could not make a ſanctuary. —that ſanctuaries muſt commence with a grant from the king, and then be confirmed by the pope; but that, if they began by a bull from the pope, it would be inſufficient, altho' they were afterwards confirmed by the king. —that the general words *ambitus*, *præcinctus*, *clauſura*, in ſuch grants, whether papal or regal, did only include the church, cloyſter, dormitory, and church-yard, but extended not to gardens, barns, ſtables, and the like. —that ſanctuary *de jure communi* was only for 40 days (which was a privilege belonging to all parochial churches and church-yards) and that ſanctuary for life, or as long as the perſon pleaſed (which was a uſual privilege of religious houſes) depended upon ſpecial grants; and that thoſe grants, together with cuſtom and uſage thereupon, were to *be well proved*, or otherwiſe declared null and void, being

being more than the common law allowed. *Keilwey*, p. 188. Bp. *Gib. Cod.* p. 1188.

Note, "that ſanctuary was never of any farther protection in a civil action, than to ſave "the body from execution—and, if ſanctuary "was granted in general words, it reached not "to high treaſon; but, it ſeems agreed, that, in "ſuch caſe, it extended to murder and all fe"lonies, SACRILEGE EXCEPTED." *Hawk. pl. of the crown, lib.* 2. *cap.* 32.

But ſanctuaries loſt much of their power in the reigns of *Henry the eighth* and *Edw. the ſixth*; and by the ſtatute of the 21ſt of *James the firſt*, they were intirely taken away.

By 27. *Hen.* 8. *cap.* 19. it was enacted, "that "whereas ſanctuaries have been a great incou"ragement to murder, rapes, robberies, &c. e"very ſanctuary-perſon ſhall wear a badge open"ly upon their upper garment, and, being found "without it, ſhall loſe the privilege of ſanctuary.

And by 32. *Hen.* 8. *cap.* 12. it was ordained, "that all ſanctuaries (except churches, church"yards, cathedral churches, hoſpitals, and "churches collegiate, and all chapels dedicated "and uſed as pariſh churches, and the ſanctua"ries to them belonging, and the places here"after to be declared places of privilege) ſhall "be utterly extinguiſhed. That *Wells*, *Weſtmin*"*ſter*, *Mancheſter*, *Northhampton*, *Norwich*, *York*, "*Darby* and *Lanceſton*, ſhall from henceforth be "allowed to be places of privilege for term of life.

"That no privilege of any ſanctuary ſhall for "the future extend to perſons guilty of willful "murder, raviſhment, burglary, robberies upon "the highway, robberies of churches or chapels, "burning of houſes or barns, or to any of the "abettors of the aforeſaid offenders.—That any "perſons taking ſanctuary, and not guilty of any "of the ſaid offences, may abjure to any of the "ſaid privileged places."—Here note, that before the 22d of *Hen.* 8. *c.* 19. any perſons taking ſanctuary in places, which did not give privilege for life, were obliged to abjure the realm within 40 days, in the following tenor — *Hoc audite juſtitiarii (vel o vos coronatores) quod exibo è regno Angliæ, et illuc iterum non reverter, niſi de licentia domini regis, vel hæredum ſuorum, ſic me Deus adjuvet.* Brac. de corona. lib. 3. cap. 16.

But, by that ſtatute, it was declared, "that, "whereas the ſtrength of the realm hath been "much diminiſhed by mariners, and many able "and expert perſons in archery, taking ſanctua"ry and abjuring the realm, offenders, who "take ſanctuary for the future, ſhall, inſtead "of quitting the realm, be confined to ſome "one ſanctuary during life."

By 32. *Hen.* 8. *cap.* 20. it was farther ordained, "that all liberties belonging to religious "houſes ſhall be enjoyed by lay-poſſeſſors, ex"cept ſanctuaries, churches and church-yards." —This contributed much to leſſen the number of ſanctuaries.

But by 21. *James* 1. *cap.* 28. which is now in force, it is finally enacted, "that no ſanctuary, or "privilege of ſanctuary, ſhall be hereafter ad"mitted or allowed in any caſe whatever." See alſo Dr. *Middleton*'s *Letter from Rome, in quarto*, pag. 113.

Sed et major aſperitas.] In *England* the lord might rob, beat, and chaſtiſe his villein at will, but was not allowed to maim him; for then the villein might have had an appeal of *maihem* againſt his lord. Le ſeigneur poit rob, naufrer et chaſtiſer ſon villein a ſon volunt: ſalve que il ne poit lui maim, car donques il avera appel de maihem envers lui. Termes de la Ley.

TITULUS NONUS.

De Patria Poteſtate.

C. viii. T. 47.

Summa tituli.

IN poteſtate noſtra ſunt liberi noſtri, quos ex juſtis nuptiis procreavimus.

The children, whom we have begotten in lawful wedlock, are under our power.

In poteſtate noſtra.] The citizens of *Rome* had antiently the power of life and death, over their children. This deſpotic authority was eſtabliſhed by *Romulus*, and afterwards confirmed by an expreſs law in the twelve tables.— *Endo liberis juſtis jus vitæ, necis, venundandique poteſtas patri eſto.* But, as the *Romans* grew politer in their manners, this law of courſe became obſolete, and was reſtrained

ſtrained by the opinions of lawyers, and diverſe imperial conſtitutions, many years before the reign of *Juſtinian*.

Inauditum filium pater occidere non poteſt, ſed accuſare eum apud præfectum præſidemve provinciæ debet. Ulp. de adulteris.

Si filius tuus in poteſtate tua eſt, res acquiſitas tibi alienare non potuit; quem, ſi pietatem patri debitam non agnoſcit, caſtigare jure patriæ poteſtatis non prohiberis: acriore remedio uſurus ſi in pari contumacia perſeveraverit; eumque præſidi provinciæ oblaturus, dicturo ſententiam, quam tu quoque dici volueris. Cod. 8. t. 47.

Definitio nuptiarum.

§ I. Nuptiæ autem, ſive matrimonium, eſt viri et mulieris conjunctio, individuam vitæ conſuetudinem continens.

§ 1. *Matrimony is a ſocial contract between a man and woman, obliging them to an inſeparable cohabitation during life.*

Qui habent in poteſtate.

§ II. Jus autem poteſtatis, quod in liberos habemus, proprium eſt civium Romanorum; nulli enim alii ſunt homines, qui talem in liberos habeant poteſtatem, qualem nos habemus.

§ 2. *The power, which we have over our children, is peculiar to the citizens of* Rome; *for there is no other people, who have the ſame power over their children, which we have over ours.*

Talem in liberos.] The power of parents, among the *Romans*, was at this time very deſpotic, altho' it did not extend abſolutely over the lives of their children, as heretofore.

Qui ſunt in poteſtate.

§ III. Qui igitur ex te et uxore tua naſcitur, in tua poteſtate eſt. Item qui ex filio tuo et uxore ejus naſcitur, id eſt, nepos tuus et neptis, æque in tua ſunt poteſtate; et pronepos, et proneptis, et deinceps cæteri. Qui autem ex filia tua naſcuntur, in poteſtate tua non ſunt; ſed in patris eorum.

§ 3. *The iſſue of yourſelf and your legal wife are immediately under your own power. Alſo the iſſue of a ſon and ſon's wife, that is, either grand-ſons or grand-daughters by them, are equally in your power; and the ſame may be ſaid of great-grand-children, &c. But children born of a daughter will not be in your power, but in the power of their own father, or father's father, &c.*

TITU-

TITULUS DECIMUS.

De Nuptiis.

D. xxiii. T. 2. C. v. T. 4. Nov. 74.

Qui possunt nuptias contrahere.

JUSTAS autem nuptias inter se cives Romani contrahunt, qui secundum præcepta legum coeunt, masculi quidem puberes, fœminæ autem viri potentes; sive patres familiarum sint, sive filii familiarum; dum tamen, si filii familiarum sint, consensum habeant parentum, quorum in potestate sunt: nam, hoc fieri debere, et civilis et naturalis ratio suadet, in tantum, ut jussus parentis præcedere debeat. Unde quæsitum est, an furiosi filia nubere, aut furiosi filius uxorem ducere, possit? Cumque super filio variabatur, nostra processit decisio, qua permissum est ad exemplum filiæ furiosi, filium quoque furiosi posse, et sine patris interventu, matrimonium sibi copulare, secundum datum ex nostra constitutione modum.

The citizens of Rome *contract valid matrimony, when they follow the precepts of the law; the males, when they arrive at puberty, and the females, when they attain to a marriageable age. The males, whether they are* patres familiarum, *fathers of a family, or* filii familiarum, *the sons of a family; but, if they are the sons of a family, they must first obtain the consent of the parents, under whose power they are. For reason, both natural and civil, convinces us, that the consent of parents should precede marriage. And from hence it became a question, whether the son of a madman could contract matrimony? But, the opinions of lawyers being various, we published our decision, by which the son, as well as the daughter of a madman, is permitted to marry without the intervention of his father, provided always, that the rules, set forth in our constitution, are observed.*

Inter se cives Romani.] The words *cives Romani*, or *Roman* citizens, comprehend all free-men in subjection to the empire.

In orbe Romano qui sunt, ex constitutione imperatoris Antonini cives Romani effecti sunt. De statu hominum, *ff.* 1. *t.* 5. *l.* 17. *Nov.* 78. *cap.* 5.

Masculi quidem puberes.] *Puberty* is esteemed by the law of *England*, as well as by the civil law, to commence in males at fourteen complete, and in females at twelve. But in *England* persons may legally enter into matrimony before puberty: and a female, when she has completed her ninth year, is intituled to dower, altho' her husband at his death was but seven, or even four years of age. *Co. Litt. p.* 31. *a.* 33 *a.* 40 *a.* But, when there is a marriage before puberty, the woman may dissent from it, at twelve or after, and the man at fourteene or after; and there needs no new marriage, if they so agree; but disagree they can not before the said ages, and then they may disagree, and marie againe to others without any divorce: and, if they once after give consent, they can never disagree after. If a man of the age of fourteene marie a woman of the age of ten, at her age of twelve, he may as well disagree as she may, tho' he were of the age of consent; because in contracts of matrimony either both must be bound, or equal election of disagreement given to both; and so, è converso, if the woman be of the age of consent, and the man under. Co. Litt. p. 78. b. 79. a.

But, in contracts *De futuro*, the law is totally different. For a contract *de futuro* is of no force, if both the parties are under the age of twenty-one; but, if one of the parties is twenty-one complete, the contract will b binding to that party. *Holt. v. Ward. Trin.* 5. *G.* 2.

Sive patres familiarum.] Among the *Romans*, all, who were *suæ potestatis*, or independent, altho' unmarried, or even not arrived at puber-

ty, were denominated according to their ſex, either *patres familiarum*, or *matres familiarum*. For, in theſe appellations, it was not intended, that the perſon only ſhould be demonſtrated, but alſo the right.

Civium Romanorum quidam ſunt patres familiarum; quædam matres familiarum. Patres familiarum ſunt, qui ſunt ſuæ poteſtatis, ſive puberes, ſive impuberes: ſimili modo matres familiarum. ff. 1. t. 6. l. 4.

Pater familias appellatur, qui in domo dominium habet: rectèque hoc nomine appellatur, quamvis filium non habeat. Non enim ſolam perſonam ejus, ſed et jus, demonſtramus. ff. 50. t. 16. l. 195. de verb. ſignif.

Conſenſum habeant parentum.] The law of *England* requires the conſent of parents, or guardians, to the marriage of their children, or wards, who are under the age of 21 years. *See the* canons *of* 1603. canon 62, 63, 100, 101, *&c.*

But the penalty in conſequence of the marriage of a minor without the conſent of his parents, or guardians, was chiefly levelled at the miniſter, who was liable to be ſuſpended for three years; for altho' the conſent of parents or guardians was required, previous to the marriage of minors, yet if the marriage had been celebrated by a prieſt without ſuch conſent, it was always held to be valid and binding; and from hence ſome bad men among the clergy took occaſion to do much miſchief, by marrying all, who offered themſelves; whoſe numbers daily increaſed, by the ſtrictneſs of the eccleſiaſtical officers in granting licences, and the obedience of the clergy in general to the canons of the church.

It was therefore thought neceſſary, in the reign of king *William the third*, to enact, "that "every parſon, who ſhall marry any perſon "without banns or licence, or ſhall knowingly "permit any other miniſter to marry any per-"ſons in any church or chapel to ſuch parſon "belonging, ſhall forfeit 100 pounds, one moi-"ety to his majeſty, and the other to the in-"former. And that every man ſo married ſhall "forfeit 10 pounds, and that every ſexton or "pariſh clerk aſſiſting ſhall forfeit 5 pounds." 7 *and* 8. *William* 3. *cap.* 5.

And, in the 10th year of Q. *Anne*, it was farther enacted by ſtatute; "that if a parſon, vicar or "curate, is in priſon, and the goaler ſhall "knowingly permit ſuch clergyman to cele-"brate marriage before publication of banns, or "licence obtained, he ſhall forfeit 100 pounds." 10 *Ann. cap.* 19. *Sect.* 176.

But theſe laws, ſtrict as they may appear, were yet found, by experience, to be ineffectual: for thoſe of the clergy, who were capable of offending, had ſeldom any ſort of preferment, ſo that ſuſpenſion to them could be little or no puniſhment; and, when the ſtatutes were inforced, it generally happened, that the proſecutor was the greateſt ſufferer, thro' the poverty of the party proſecuted; ſo that the inſufficiency of all theſe laws to effect the good purpoſes, for which they were intended, rendered it abſolutely neceſſary to make a law, which, if I may be allowed the expreſſion, ſhould execute itſelf.

This law is the ſtatute of the 26th of K. *George the ſecond*, by which it is ordained, in imitation of the *Roman* law (and not in contradiction to any divine precept; *ſee* Milton's *Tetrachordon.*) "that all marriages celebrated, without banns "or licence firſt had, ſhall be null and void, to "all intents and purpoſes: and that the clergy-"man, who ſhall be proved to have ſolemnized "any ſuch marriage, ſhall be tranſported to ſome "of his Majeſty's plantations in *America* for 14 "years." 26. *Geo.* 2.

For particulars the reader is referred to the act at large, which tends in general to ſettle property, and wipe diſgrace from the nation.

Cumque ſuper filio.] As the children of a daughter are not under the power of her father, the conſent of the father is, by the civil law, not ſo eſſential, but that it may be diſpenſed with upon extraordinary occaſions; altho' regularly the precedent conſent of the father, even of an emancipated daughter under the age of twenty-five years, was as neceſſary to confirm the mariage, as the conſent of the father of the intended huſband. *v. C.* 5. *t.* 4. *ll.* 18, 20.

Secundum datum.] The rules, ſet forth in the conſtitution, are, that at *Rome* the curators of the father muſt give the portion with the approbation of the præfect of the city; and that, in the provinces, the portion muſt be given with the approbation of the governors. *C.* 1. t. 4. *l.* 28.

Quæ uxores duci poſſunt vel non. De cognatis, ac primum de parentibus et liberis.

§ I. Ergo non omnes nobis uxores ducere licet: nam a quarundam nuptiis abſtinendum eſt: inter eas enim perſonas, quæ parentum liberorumve locum inter ſe obtinent, contrahi nuptiæ non poſſunt; veluti inter patrem et filiam, vel avum et neptem, vel matrem et filium, vel aviam et nepotem, et uſque in infinitum: et, ſi tales perſonæ inter ſe coïerint, nefarias atque inceſtas nuptias contraxiſſe dicuntur. Et hæc adeo vera ſunt,

ut

ut, quamvis per adoptionem parentum liberorumve loco ſibi eſſe cœperint, non poſſunt inter ſe matrimonio jungi; in tantum, ut etiam, diſſoluta adoptione, idem juris maneat. Itaque eam, quæ tibi per adoptionem filia vel neptis eſſe cœperit, non poteris uxorem ducere, quamvis eam emancipaveris.

§ 1. *We are not permitted to marry all women without diſtinction; for there are ſome, with whom marriage is forbidden. For matrimony muſt not be contracted between parents and their children, as between a father and daughter, a grandfather and his grand-daughter, a mother and her ſon, a grand-mother and her grand-ſon; and the ſame prohibition extends with reſpect to all aſcendents and deſcendents in a right line* in infinitum. *And, if ſuch perſons cohabit together, they are ſaid to have contracted a criminal and inceſtuous marriage; which is undoubtedly true; inaſmuch as thoſe, who only hold the place of parents and children by adoption, can by no means marry; and the ſame law remains in force, even after the adoption is diſſolved. Whoever therefore hath once been either your adopted daughter or grand-daughter, the ſame cannot afterwards be taken by you to wife, altho' ſhe hath been emancipated.*

De fratribus et ſororibus.

§ II. Inter eas quoque perſonas, quæ ex tranſverſo gradu cognationis junguntur, eſt quædam ſimilis obſervatio, ſed non tanta. Sane enim inter fratrem ſororemque nuptiæ prohibitæ ſunt, ſive ab eodem patre eademque matre nati fuerint, ſive ab altero eorum. Sed, ſi qua per adoptionem ſoror tibi eſſe cœperit, quamdiu quidem conſtat adoptio, ſane inter te et eam nuptiæ conſiſtere non poſſunt, cum vero per emancipationem adoptio ſit diſſoluta, poteris eam uxorem ducere: ſed et ſi tu emancipatus fueris, nihil eſt impedimento nuptiis. Et ideo conſtat, ſi quis generum adoptare velit, debere eum antea filiam ſuam emancipare: et, ſi quis velit nurum adoptare, debere eum antea filium ſuum emancipare.

§ 2. *Matrimony is alſo prohibited between collaterals, but the prohibition is not of ſo great an extent, as that, which relates to parents and their children. A brother and ſiſter are forbidden to marry, whether they are the children of the ſame father and mother, or of either. And, if any perſon becomes your ſiſter by adoption, as long as ſuch adoption ſubſiſts, a marriage contracted between her and you can not be valid. But, when the adoption is deſtroyed by emancipation, ſhe may then be taken to wife. Alſo if you yourſelf are emancipated, there will not then remain any impediment, altho' your ſiſter by adoption is not ſo. From hence it appears, that if a man would adopt his ſon-in-law, he ſhould firſt emancipate his daughter, and that, whoever would adopt his daughter-in-law, ſhould previouſly emancipate his ſon.*

Inter eas quoque perſonas.] Marriage in *England* is forbidden only between ſuch perſons, who are prohibited to marry by the *levitical law*, which is adjudged, in the collateral lines, to extend no farther than the third degree. But the prohibition is equally binding, whether the perſons are related by affinity, or conſanguinity. The levitical computation of degrees is the ſame as the computation in the civil law, by which there are counted as many degrees, as there are perſons, the common ſtock not being reckoned. This was alſo the antient manner of computing by the canon law, according to ſome authors, who ſuppoſe, that pope *Alexander the ſecond*, perceiving diſpenſations to be greatly lucrative to the church, and being at the ſame time conſcious, that it had univerſally obtained, that perſons might marry in the fourth degree, began a new

new computation, according to which the canoniſts have ſince reckoned all degrees, *in the equal tranſverſal lines*, from the common ſtock on one ſide only: and, in *the unequal tranſverſal lines*, according to the diſtance of that perſon, who is remoteſt from the common ſtock. *Decret. part.* 2. *cauſ.* 35. *q.* 5.

It is evident from this alteration in, or revival of, the canon law, that not only firſt couſins, but alſo ſecond, and third couſins, were prohibited from matrimony; nor is it leſs evident, that ſo extenſive a prohibition muſt have cauſed frequent diſpenſations.

But it was enacted by ſtatute, in the reign of *Henry the eighth, that no prohibition* (God's law except) *ſhall impeach any marriage without the levitical degrees.* 32 Hen. 8. cap. 38.

The intention of this ſtatute was to reſtore the levitical computation, which has ſince been followed by the judges in all their reſolutions. It has therefore been frequently reſolved, that marriage with a ſiſter's daughter is inceſtuous, becauſe ſuch marriage is in the *third degree*: that matrimony with a wife's ſiſter's daughter is alſo inceſtuous, becauſe it is likewiſe in the *third degree*. 5. *Mod.* 448. And that marriage with the relict or widow of a great uncle is not inceſtuous, becauſe ſuch perſon is in the *fourth degree*. *Harriſon* v. *Burwel, Vaughan*, 206.

Filium emancipare.] For otherwiſe the marriage would be diſſolved; inaſmuch as it is contrary to law, that brothers and ſiſters ſhould intermarry. *Theoph.*

De fratris et ſororis filia vel nepte.

§ III. Fratris vero vel ſororis filiam uxorem ducere non licet: ſed nec neptem fratris vel ſororis quis ducere poteſt, quamvis quarto gradu ſint: cujus enim filiam ducere non licet, neque ejus neptem permittitur. Ejus vero mulieris, quam pater tuus adoptavit, filiam non videris prohiberi uxorem ducere: quia neque naturali, neque civili, jure tibi conjungitur.

§ 3. *It is unlawful to marry the daughter of a brother, or a ſiſter; neither is it lawful to marry the grand-daughter of a brother, or ſiſter, altho' they are in the fourth degree. For when we are prohibited to take the daughter of any perſon in marriage, we are alſo prohibited to take his grand-daughter. But it appears not, that there is any impediment againſt the marriage of a ſon with the daughter of her, whom his father hath adopted; for they bear not to each other any relation either natural or civil.*

De conſobrinis.

§ IV. Duorum autem fratrum, vel ſororum liberi, vel fratris et ſororis, conjungi poſſunt.

§ 4. *The children of two brothers, or two ſiſters, or of a brother and ſiſter, may legally be joined together in matrimony.*

De amita, matertera, amita magna, matertera magna.

§ V. Item amitam, licet adoptivam, ducere uxorem non licet. Item nec materteram: quia parentum loco habentur. Qua ratione verum eſt, magnam quoque amitam, et materteram magnam, prohiberi uxorem ducere.

§ 5. *A man is not permitted to marry his aunt on the father's ſide, altho' ſhe is only ſo by adoption; neither can a man marry his aunt on the mother's ſide; becauſe they are both eſteemed to be the repreſentatives of parents. And for the ſame reaſon no perſon can contract matrimony with his great-aunt, either on his father's, or his mother's ſide.*

Magnam quoque amitam.] By the law of *England* it is otherwiſe; for upon a prohibition for proceeding againſt a perſon in the eccleſiaſtical court, who had married the widow of his great-uncle, it was determined by all the judges, that ſuch marriage, being in the fourth degree, was not forbidden by the levitical law, and was therefore allowable. *Vaugh.* 206. 2 *Ven.* 9.

De

De affinibus, et primum de privigna et nuru.

§ VI. Affinitatis quoque veneratione a quarundam nuptiis abſtinere neceſſe eſt: ut ecce privignam aut nurum ducere non licet: quia utræque filiæ loco ſunt. Quod ita ſcilicet accipi debet, ſi fuit nurus aut privigna tua. Nam, ſi adhuc nurus tua eſt, id eſt, ſi adhuc nupta eſt filio tuo, alia ratione uxorem eam ducere non poteris: quia eadem duobus nupta eſſe non poteſt. Item ſi adhuc privigna tua eſt, id eſt, ſi mater ejus tibi nupta eſt, ideo eam uxorem ducere non poteris, quia duas uxores eodem tempore habere non licet.

§ 6. *We are under a neceſſity of abſtaining from certain marriages, thro' a veneration for affinity; for it is unlawful to marry a wife's daughter, or a ſon's wife, in that both are in the place of daughters. And this rule muſt be underſtood to relate not only to thoſe, who actually are, but alſo to thoſe, who have been, our daughters-in-law at any time. For marriage with a ſon's wife, whileſt ſhe continues to be his wife, is prohibited on another account,* viz. *becauſe the ſame woman can not, at one and the ſame time, be the wife of two. And the marriage of a man with his wife's daughter, whileſt her mother continues to be his wife, is alſo prohibited, becauſe it is unlawful for one man to have two wives at the ſame time.*

De ſocru et noverca.

§ VII. Socrum quoque et novercam prohibitum eſt uxorem ducere: quia matris loco ſunt: quod et ipſum, diſſoluta demum adfinitate, procedit: alioquin, ſi adhuc noverca eſt, id eſt, ſi adhuc patri tuo nupta eſt, communi jure impeditur tibi nubere, quia eadem duobus nupta eſſe non poteſt. Item ſi adhuc ſocrus eſt, id eſt, ſi adhuc filia ejus tibi nupta eſt, ideo impediuntur tibi nuptiæ, quia duas uxores habere non potes.

§ 7. *A man is forbidden to marry his wife's mother, and his father's wife, becauſe they both hold the place of mothers: and this injunction muſt be obſerved, altho' the affinity is diſſolved: for, omitting our veneration for affinity, a father's wife, whileſt ſhe continues to be ſo, is prohibited to marry, becauſe no woman can have two husbands at the ſame time. A man is alſo reſtrained from matrimony with his wife's mother, her daughter continuing to be his wife, becauſe it is againſt the law to have two wives.*

De comprivignis.

§ VIII. Mariti tamen filius ex alia uxore, et uxoris filia ex alio marito, vel contra, matrimonium recte contrahunt; licet habeant fratrem ſororemve ex matrimonio poſtea contracto natos.

§ 8. *The Son of a huſband by a former wife, and the daughter of a wife by a former huſband, and,* e contra, *the daughter of an husband by a former wife and the ſon of a wife by a former husband may lawfully contract matrimony, even tho' a brother, or ſiſter, is born of ſuch ſecond marriage between their reſpective parents.*

De quaſi privigna, quaſi nuru, et quaſi noverca.

§ IX. Si uxor tua poſt divortium ex alio filiam procreavit, hæc non eſt quidem privigna tua: ſed Julianus ab hujuſmodi nuptiis abſtineri debere ait.

ait: nam conſtat, nec ſponſam filii nurum eſſe, nec patris ſponſam novercam eſſe: rectius tamen et jure facturos eos, qui ab hujuſmodi nuptiis abſtinuerint.

§ 9. *If a wife, after divorce, brings forth a daughter by a ſecond huſband, ſuch daughter is not to be reckoned a daughter-in-law to the firſt huſband. It is nevertheleſs the opinion of* Julian, *that we ought to abſtain from ſuch nuptials. It is alſo evident, that the* eſpouſed *wife of a ſon is not a daughter-in-law to his father; and that the* eſpouſed *wife of a father, is not a ſtep-mother to his ſon. Yet thoſe, who abſtain from ſuch nuptials, demean themſelves rightly.*

Si uxor tua poſt divortium.] It will be ſufficient in this place to obſerve, that divorces with us are either *a menſa et thoro*, or, *a vinculo matrimonii*. A divorce, *a menſa et thoro*, ſeparates only from bed and board, but does not baſtardize the children, who were begotten before ſuch divorce; and perſons ſo divorced may afterwards live together, if they mutually conſent. But a divorce, *a vinculo matrimonii*, intirely diſſolves the bond of matrimony *ab initio*, ſo that the iſſue is baſtardized, and the parties divorced at liberty to marry. But, if either of the perſons dies before the ſentence of divorce is pronounced, the ſentence ought not to be pronounced afterwards, and therefore the iſſue is eſteemed legitimate. For a marriage even within the levitical degrees is voidable only, and not void, until ſentence is given. *Vaugh.* 208. 220.

The cauſes of divorce *a vinculo matrimonii* are now three only, conſanguinity, affinity, and impotence; for, by the late act of the 26th of *Geo. the ſecond*, precontract has ceaſed to be of this number; and all divorces for other cauſes than theſe three, which are precedent to matrimony, are only *a menſa et thoro*, from bed and board: for a divorce on account of cruelty does not diſſolve a marriage, but is only allowed for the ſafety of the woman againſt ill uſage: and even in a cauſe of adultery the ſentence of an eccleſiaſtical court has no other effect than to ſeparate the parties without affecting the bond of matrimony: but, in caſes of adultery in the woman, it is common to obtain an act of parliament for the abſolute diſſolution of the marriage.

Among the *Romans* the bond of matrimony was frequently diſſolved upon the moſt trivial pretences, and ſometimes even the mutual conſent of parties was alone ſufficient, as in the caſe of *Cato* and *Martia*, related by *Plutarch*; "for when *Hortenſius* earneſtly deſired *Martia*, "*Cato* did not deny the requeſt of his friend, "but ſaid, that *Philip* the father of *Martia* "ought alſo to be conſulted. *Philip* therefore, "being ſent for, came; and, finding they were "all agreed, gave his daughter *Martia* to *Hor*-"*tenſius* in the preſence of *Cato*, who himſelf "aſſiſted at the marriage."

The reader may obſerve from this extract, that *Cato* did not lend his wife, but abſolutely parted from her, which was allowable. See *Kennet's antiq. p.* 332. in which this matter is fully diſcuſſed, and the aſſertions of *Tertullian* are confuted.

But the emperor *Juſtinian* prohibited all diſſolutions of marriage, which were merely voluntary, unleſs it could be made evident, that chaſtity was the motive.

Quia vero ex conſenſu aliqui uſque ad præſens alterna matrimonia ſolvebant, hoc de cætero fieri nullo finimus modo, niſi forte quidam caſtitatis concupiſcentia hoc fecerint. Nov. 17. cap. 10.

The emperor alſo limited the cauſes of divorce, and ordained, in favor of children, that they ſhould not be prejudiced by the ſeparation of their parents.

Nati filii nullo modo lædantur ex ſeparatione nuptiarum, ſed ad parentum hereditatem vocentur, &c. Nov. 117. cap. 7, 8.

De ſervili cognatione.

§ X. Illud certum eſt, ſerviles quoque cognationes impedimento nuptiis eſſe, ſi forte pater et filia, aut frater et ſoror, manumiſſi fuerint.

§ 10. *It is not to be doubted, but that ſervile cognation is an impediment to matrimony, as when a father and daughter, or a brother and ſiſter, are manumitted.*

Impedimento nuptiis.] Altho' the relation of father and daughter, brother and ſiſter, &c. produced no evil effect among ſlaves, whileſt they continued ſo, yet it became a bar to matrimony after their infranchiſement.— *Semper enim in contrahendis matrimoniis naturale jus et pudor inſpicitur* —— And perſons ſo nearly related, as father and daughter, brother and ſiſter, &c. even in a ſtate of ſlavery, were not permitted to cohabit together in *contubernio*. Vinn.

De

De reliquis prohibitionibus.

§ XI. Sunt et aliæ perſonæ, quæ propter diverſas rationes nuptias contrahere prohibentur, quas in libris digeſtorum ſeu pandectarum, ex jure veteri collectarum, enumerari permiſimus.

§ 11. *There are, beſides theſe already mentioned, many other perſons, who, for diverſe reaſons, are prohibited to marry with each other; all whom we have cauſed to be enumerated in the digeſts, collected from the old law.*

Sunt et aliæ perſonæ.] Senators were prohibited to marry with libertines; tutors and curators with their wards, &c. *ff.* 23. *t.* 2. *ll.* 16. 42. 44. 57. 66. *de ritu nupt.*

De pœnis injuſtarum nuptiarum.

§ XII. Si adverſus ea, quæ diximus, aliqui coierint, nec vir, nec uxor, nec nuptiæ, nec matrimonium, nec dos intelligitur. Itaque ii, qui ex eo coitu naſcuntur, in poteſtate patris non ſunt: ſed tales ſunt (quantum ad patriam poteſtatem pertinet) quales ſunt ii, quos mater vulgo concepit. Nam nec hi patrem habere intelliguntur, cum et iis pater incertus ſit; unde ſolent *ſpurii* appellari παρα την σποραν, et ἀπατορες, quaſi ſine patre filii. Sequitur ergo, ut, diſſoluto tali coitu, nec dotis, nec donationis exactioni locus ſit. Qui autem prohibitas nuptias contrahunt, et alias pœnas patiuntur, quæ ſacris conſtitutionibus continentur.

§ 12. *If any perſons preſume to cohabit together in contempt of the rules, which we have here laid down, they ſhall not be deemed huſband and wife, neither ſhall their marriage, or any portion given on account of ſuch marriage, be valid. And the children, born in ſuch cohabitation, ſhall not be under the power of their father. For, in reſpect to paternal power, they reſemble the children of a common woman, who are looked upon as not having a father, becauſe it is incertain, who he is. They are therefore called in Latin* ſpurii, *and in Greek* ἀπάτορες; i. e. *without a father: and from hence it follows, that, after the diſſolution of any ſuch marriage, no portion, or gift,* propter nuptias, *can legally be claimed. But thoſe, who contract ſuch prohibited matrimony, muſt undergo the farther puniſhments ſet forth in our conſtitutions.*

Conſtitutionibus.] *Cod.* 5. *t.* 5. *ll.* 4. 6. *cum auth: ſequente,* quæ multam irrogat pecuniariam, infamiam, et cum infamia pœnam ſtupri. *Vinn.*

De legitimatione.

§ XIII. Aliquando autem evenit, ut liberi, qui ſtatim, ut nati ſunt, in poteſtate parentum non ſunt, poſtea redigantur in poteſtatem patris: qualis eſt is, qui dum naturalis fuerat, poſtea curiæ datus, poteſtati patris ſubjicitur: nec non is, qui, a muliere libera procreatus, cujus matrimonium minime legibus interdictum fuerat, ſed ad quam pater conſuetudinem habuerat, poſtea, ex noſtra conſtitutione dotalibus inſtrumentis compoſitis, in poteſtate patris efficitur. Quod et aliis liberis, qui ex eodem matrimonio fuerint procreati, ſimiliter noſtra conſtitutio præbuit.

§ 13. *It ſometimes happens, that the children, who at the time of their birth were not under the power of their parents, are reduced under it afterwards. Thus a natu-*

ral ſon, who is made a Decurion, becomes ſubject to his father's power. And he alſo, who is born of a free-woman, with whom marriage is not prohibited, will likewiſe become ſubject to the power of his father, as ſoon as the marriage inſtruments are drawn, as our conſtitution directs; which allows the ſame benefits to thoſe, who are born before marriage, as to thoſe, who are born ſubſequent to it.

Curia datus.] The *Decurions* were ſo called, becauſe the *curia*, or *ſenate*, of the colonies, was ſuppoſed to conſiſt of a tenth part of the people.

"*Decuriones quidem dictos aiunt ex eo, quod initio, cum coloniæ deducerentur, decima pars eorum, qui ducerentur, conſilii publici gratia conſcribi ſolita ſit.* ff. 50. t. 16. *l.* 239. §. 5.

Nec non is.] By a conſtitution or canon, made in the time of pope *Alexander the third*, it was enacted, "that children, born before the ſolem-" nization of matrimony, might nevertheleſs " become legitimate by the ſubſequent marriage " of their parents." And, in conſequence of this canon, all the biſhops of *England*, in the reign of *Henry the third*, petitioned the lords, " that " they would conſent, that all ſuch, who were " born before matrimony, ſhould be legitimate, " as well as thoſe, who were born after matri-" mony, in reſpect to hereditary ſucceſſion; in-" aſmuch as the church accepteth all ſuch as " legitimate."

But all the earls and barons with one voice anſwered, " that they would not change the laws " of *England*, which hitherto had been uſed " and approved." *Rogaverunt omnes epiſcopi magnates, ut conſentirent, quod nati ante matrimonium eſſent legitimi, ſicut illi, qui nati ſunt poſt matrimonium, quantum ad ſucceſſionem hereditariam, quia eccleſia tales habet pro legitimis. Et omnes comites et barones una voce reſponderunt, quod nolunt leges Angliæ mutare, quæ huc uſque uſitatæ ſunt et approbatæ.* Stat. Merton. 20 Henr. 3. Co. Litt. 245. a. 2 Co. inſt. 97.

Ex noſtra conſtitutione.] *C.* 5. *t.* 27. *l.* 10. De naturalibus liberis.

TITULUS UNDECIMUS.

De Adoptionibus.

D. 1. T. 7. C. viii. T. 48.

Continuatio.

NON ſolum autem naturales liberi, ſecundum ea, quæ diximus, in poteſtate noſtra ſunt; verum etiam ii, quos adoptamus.

It appears from what has been already ſaid, that all natural children are ſubject to paternal power. We muſt now add, that not only natural children are ſubject to it, but thoſe alſo, whom we adopt.

Naturales liberi.] The word *natural* is here uſed for *legitimate*.

Diviſio adoptionis.

§ I. Adoptio autem duobus modis fit, aut principali reſcripto, aut imperio magiſtratus. Imperatoris auctoritate adoptare quis poteſt eos, eaſve, qui, quæve, ſui juris ſunt, quæ ſpecies adoptionis dicitur *arrogatio*. Imperio magiſtratus adoptamus eos eaſve, qui quæve in poteſtate parentum ſunt; ſive primum gradum liberorum obtineant, qualis eſt filius, filia; ſive inferiorem, qualis eſt nepos, neptis, pronepos, proneptis.

§ 1. *Adoption is made two ways, either by a reſcript from the emperor, or by the authority of the magiſtrate. The imperial reſcript impowers us to adopt perſons of either*

either ſex, who are ſui juris; i. e. *independent and not under the power of parents; and this ſpecies of adoption is called* arrogation. *But it is by the authority of the magiſtrate, that we adopt perſons actually under the power of their parents, whether they are in the firſt degree, as ſons and daughters; or in an inferior degree, as grand-children, or great grand-children.*

Adoptio autem.] It is certain, that adoption was never practiſed in *England*. Sir *Edward Coke* writes thus concerning it. We remember not that we have read in any book of the legitimation or adoption of an heir, but only in Bracton, and that to no little purpoſe. But the ſureſt adoption is to make good aſſurance of the land by learned advice. The paſſage, referred to in *Bracton*, is in theſe words. *Legitimantur etiam quandoque, quaſi per adoptionem, et de conſenſu et voluntate parentum, ut ſi uxor alicujus de alio conceperit, quam de viro ſuo, et, licet de hoc conſtiterit in veritate, ſi vir ipſum in domo ſua ſuſceperit et advocaverit et nutrierit ut filium, erit hæres et legitimus; vel ſi expreſſe non advocaverit, dum tamen illum non amoverit, ſive vir omnino ignoraverit, vel ſciverit, vel dubitaverit, talis legitimus ut hæres judicabitur, eo quod naſcitur de uxore, dum tamen præſumi poſſit, quod potuit ipſum genuiſſe.* Bract. lib. 2. cap. 29.

Qui poſſunt adoptare filium-familias, vel non.

§ II. Sed hodie, ex noſtra conſtitutione, cum filius-familias à patre naturali extraneæ perſonæ in adoptionem datur, jura patris naturalis minime diſſolvuntur; nec quicquam ad patrem adoptivum tranſit, nec in poteſtate ejus eſt: licet ab inteſtato jura ſucceſſionis ei à nobis tributa ſint. Si vero pater naturalis non extraneo, ſed avo filii ſui materno; vel ſi ipſe pater naturalis fuerit emancipatus, etiam avo vel proavo ſimili modo paterno vel materno filium ſuum dederit in adoptionem; in hoc caſu, quia concurrunt in unam perſonam et naturalia et adoptionis jura, manet ſtabile jus patris adoptivi, et naturali vinculo copulatum, et legitimo adoptionis modo conſtitutum, ut et in familia et in poteſtate hujuſmodi patris adoptivi ſit.

§ 2. *But now, by our conſtitution, when the ſon of a family is given in adoption by his natural father to a ſtranger, the right of paternal power in the natural father is not diſſolved, neither does any thing paſs to the adoptive father, neither is the adopted ſon in his power, altho' ſuch ſon is by us allowed to have the right of ſucceſſion to his adoptive father, if he dies inteſtate. But if a natural father ſhould give his ſon in adoption, not to a ſtranger, but to the maternal grandfather of ſuch ſon; or if a natural father, who hath been emancipated, ſhould give his ſon, begotten after emancipation, to his paternal or maternal grandfather, or great-grandfather, in this caſe, the rights of nature and adoption concurring, the power of the adoptive father is eſtabliſhed both by natural ties and legal adoption, ſo that the adopted ſon would be both in the family, and under the power of his adoptive father.*

Ex noſtra conſtitutione.] *Cod.* 8. *t.* 47. *l. pen. De adoptionibus.* Before this conſtitution, agnation was diſſolved by adoption, which frequently proved an injury, inſtead of a benefit, to thoſe, who were adopted.

Non extraneo.] *Extraneam autem perſonam intelligit* Juſtinianus *omnem, quæ extra lineam parentum ſit: unde qui a patruo aut avunculo adoptati ſunt, perinde haberi debent, ac ſi a quovis extraneo adoptati forent.* Vinn. h. t.

De arrogatione impuberis.

§ III. Cum autem impubes per principale reſcriptum arrogatur, cauſa cognita, adrogatio fieri permittitur: et exquiritur cauſa arrogationis, an honeſta ſit, expediatque pupillo? et cum quibuſdam conditionibus arrogatio

fit; id eſt, ut caveat arrogator perſonæ publicæ, ſi intra pubertatem pupillus deceſſerit, reſtituturum ſe bona illis, qui, ſi adoptio facta non eſſet, ad ſucceſſionem ejus venturi eſſent. Item non aliter emancipare eum poteſt arrogator, niſi, cauſa cognita, dignus emancipatione fuerit; et tunc ſua bona ei reddat. Sed, et ſi decedens pater eum exhæredaverit, vel vivus ſine juſta cauſa emancipaverit, jubetur quartam partem ei bonorum ſuorum relinquere; videlicet, præter bona, quæ ad patrem adoptivum tranſtulit, et quorum commodum ei poſtea acquiſivit.

§ 3. *When any perſon, not arrived at puberty, is arrogated by the imperial reſcript, the cauſe is firſt inquired into, that it may be known, whether the arrogation is juſtly founded, and expedient for the pupil. For ſuch arrogation is always made on certain conditions, and the arrogator is obliged to give caution before a public notary, thereby binding himſelf, if his pupil ſhould die within the age of puberty, to reſtore all the goods and effects of ſuch pupil to thoſe, who would have ſucceeded him, if no arrogation had been made. The arrogator is alſo prohibited to emancipate, unleſs he has given legal proof, that his arrogated ſon deſerves emancipation; and even then he is bound to make full reſtitution of all things belonging to ſuch ſon. Alſo if a father, upon his death-bed, hath diſinherited his arrogated ſon, or when in health hath emancipated him, without a juſt cauſe, then the father is commanded to leave the fourth part of all his goods to his ſon, beſides what ſuch ſon brought to him at the time of arrogation, and acquired for him afterwards.*

Bonorum.] With us the word *goods* does not comprehend thoſe things, which are in the nature of freehold, or parcel of it; but denotes only chattels. But in the civil law the word *bona* has a greater latitude, and generally comprehends a man's whole eſtate, of whatſoever it conſiſts.

De ætate adoptantis et adoptati.

§ IV. Minorem natu majorem non poſſe adoptare placet: adoptio enim naturam imitatur; et pro monſtro eſt, ut major ſit filius, quam pater. Debet itaque is, qui ſibi filium per adoptionem aut arrogationem facit, plena pubertate [id eſt, decem et octo annis] præcedere.

§ 4. *A junior is not permitted to adopt a ſenior; for adoption imitates nature; and it ſeems unnatural, that a ſon ſhould be older than his father. He therefore, who would either adopt or arrogate, ſhould be a ſenior to his adopted or arrogated ſon by full puberty, that is, by eighteen years.*

De adoptione in locum nepotis vel neptis, vel deinceps.

§ V. Licet autem et in locum nepotis vel neptis, pronepotis vel proneptis, vel deinceps, adoptare, quamvis filium quis non habeat.

§ 5. *It is lawful to adopt a perſon either as a grand-ſon or grand-daughter, great grand-ſon or great grand-daughter, or in a more diſtant degree, altho' the adoptor hath no ſon.*

De adoptione filii alieni in locum nepotis, et contra.

§ VI. Et tam filium alienum quis in locum nepotis adoptare poteſt, quam nepotem in locum filii.

§. 6.

§ 6. *A man may adopt the ſon of another as his grand-ſon, and the grand-ſon of another as his ſon.*

De adoptione in locum nepotis.

§ VII. Sed ſi quis nepotis loco adoptet, vel quaſi ex filio, quem habet jam adoptatum, vel quaſi ex illo, quem naturalem in ſua poteſtate habet, eo caſu et filius conſentire debet, ne ei invito ſuus hæres agnaſcatur. Sed, ex contrario, ſi avus ex filio nepotem det in adoptionem, non eſt neceſſe, filium conſentire.

§ 7. *If any man, who has already either a natural or an adopted ſon, is deſirous to adopt another, as his grand-ſon, the conſent of his ſon, whether natural or adopted, ought in this caſe to be firſt obtained, leſt a* ſuus hæres, *or proper heir, ſhould be intruded upon him. But, on the contrary, if a grand-father is willing to give his grand-ſon in adoption, the conſent of the ſon is not neceſſary.*

Qui dari poſſunt in adoptionem.

§ VIII. In plurimis autem cauſis adſimilatur is, qui adoptatus vel arrogatus eſt, ei, qui ex legitimo matrimonio natus eſt; et ideo, ſi quis per imperatorem, vel apud prætorem, vel præſidem provinciæ, non extraneum adoptaverit, poteſt eundem in adoptionem alii dare.

§ 8. *He, who is either adopted or arrogated, bears ſimilitude in many things to a ſon born in lawful matrimony, and therefore, whoever is adopted either by reſcript, or before a prætor, or before the governor of a province, the ſame, if he is not a ſtranger, may be given in adoption to another.*

Non extraneum adoptaverit.] No perſon can give another in adoption, who is not under his power; and it appears by the ſecond paragraph of this title, that, if *Titius* ſhould adopt a ſtranger, the ſtranger would not be ſubject to *Titius*, but ſtill remain under the power of his natural father; and it therefore follows, that *Titius* could not give ſuch ſtranger in adoption to another.

Si is, qui generare non poteſt, adoptet.

§ IX. Sed et illud utriuſque adoptionis commune eſt, quod et ii, qui generare non poſſunt, quales ſunt ſpadones, adoptare poſſunt: caſtrati autem non poſſunt.

§ 9. *It is obſerved as a common rule both in adoption, and arrogation, that ſuch, who are impotent* [*whom we denominate* Spadones] *may adopt children; but that thoſe, who are caſtrated, can not adopt.*

Quales ſunt Spadones.] Thoſe, who were denominated *Spadones* might alſo marry, as well as adopt, as there was a poſſibility of their becoming potent. And by marriage they were intituled to have an action *pro dote*. ff. 23. t. 3. *l.* 39. *de jure dotium*. The emperor *Leo*, in his novels, permitted even caſtrated perſons to adopt. *Leon. Nov.* 26.

Si fœmina adoptet.

§ X. Fœminæ quoque arrogare non poſſunt, quia nec naturales liberos in ſua poteſtate habent: ſed, ex indulgentia principis, ad ſolatium liberorum amiſſorum adoptare poſſunt.

§ 10. *Women are alſo prohibited to adopt; for the law does not permit them to have even their own children under their power: but, when death hath deprived them of their children, they may, by the indulgence of the prince, adopt others, as a comfort and recompence for their loſs.*

Sed ex indulgentia.] ff. 5. t. 2. *l.* 29. *de inofficioſo teſtamento.*

De liberis arrogatis.

§ XI. Illud proprium eſt adoptionis illius, quæ per ſacrum oraculum fit, quod is, qui liberos in poteſtate habet, ſi ſe adrogandum dederit, non ſolum ipſe poteſtati arrogatoris ſubjicitur, ſed etiam liberi ejus fiunt in ejuſdem poteſtate, tanquam nepotes. Sic etenim divus Auguſtus non ante Tiberium adoptavit, quam is Germanicum adoptaſſet; ut protinus, arrogatione facta, inciperet Germanicus Auguſti nepos eſſe.

§ 11. *It is peculiar to that kind of adoption, which is made by reſcript, that if a perſon, having children under his power, ſhould give himſelf in arrogation, both he, as a Son, and his children, as grand-children, would become ſubject to the power of the arrogator. It was for this reaſon, that* Auguſtus *did not adopt* Tiberius, *'till* Tiberius *had adopted* Germanicus; *ſo that* Tiberius *became the ſon and* Germanicus *the Grandſon of* Auguſtus, *at the ſame inſtant, by arrogation.*

Hoc proprium eſt.] For in common adoptions, made before a magiſtrate, no other perſon can paſs under the power of the adoptor, than the ſingle perſon, whom he adopts; and the reaſon of this difference between adoption and arrogation is plain. "*Nam in adoptionem dantur filii-*
"*familiarum, quorum liberi ſunt in poteſtate alte-*
"*rius; nempe ejus, qui in adoptionem dat: ideoque*
"*etiam in illius poteſtate remanent. Arrogantur au-*
"*tem patres-familiarum, qui cum ipſi liberos ſuos in*
"*poteſtatem habeant, nihil mirum, ſi ſecum etiam*
"*illos, in familiam et poteſtatem alienam, transfe-*
"*rant.*" Vinn. *h. l.*

Auguſtus non ante.] *vid.* Tac. 4. *annal. cap.* 57. & Suetonium *in* Tib. *cap.* 15.

De ſervo adoptato, vel filio nominato, a domino.

§ XII. Apud Catonem bene ſcriptum refert antiquitas, ſervos, ſi a domino adoptati ſint, ex hoc ipſo poſſe liberari. Unde et nos eruditi, in noſtra conſtitutione, etiam eum ſervum, quem dominus, actis intervenientibus, filium ſuum nominaverit, liberum eſſe conſtituimus: licet hoc ad jus filii accipiendum non ſufficiat.

§ 12. *The following anſwer of* Cato *was approved of by the antient lawyers,* viz. *that ſlaves, adopted by their maſters, obtain freedom by the adoption. And, from hence inſtructed, we have enacted by our conſtitution, that a ſlave, whom any maſter nominates to be his ſon, in the preſence of a magiſtrate, becomes free by ſuch nomination, altho' it does not convey to him any filial right.*

In noſtra conſtitutione.] *C.* 7. *t.* 6. *p.* 10. *de latina libertate tollenda.*

TITU-

TITULUS DUODECIMUS.

Quibus modis jus patriæ poteſtatis ſolvitur.

D. 1. T. 7. Nov. 81.

Scopus et nexus. De morte.

VIdeamus nunc, quibus modis ii, qui alieno juri ſunt ſubjecti, eo jure liberentur. Et quidem, quemadmodum liberentur ſervi a poteſtate dominorum, ex iis intelligere poſſumus, quæ de ſervis manumittendis ſuperius expoſuimus. Hi vero, qui in poteſtate parentis ſunt, mortuo eo, ſui juris fiunt. Sed hoc diſtinctionem recipit: nam, mortuo patre, ſane omnimodo filii, filiæve, ſui juris efficiuntur: mortuo vero avo, non omnino nepotes, nepteſve, ſui juris fiunt: ſed ita, ſi poſt mortem avi in poteſtatem patris ſui recaſuri non ſunt. Itaque, ſi, moriente avo, pater eorum vivit, et in poteſtate patris ſui eſt, tunc poſt obitum avi in poteſtate patris ſui fiunt. Si vero is, quo tempore avus moritur, aut jam mortuus eſt, aut, per emancipationem, exiit de poteſtate patris, tunc ii, qui in poteſtatem ejus cadere non poſſunt, ſui juris fiunt.

Let us now inquire how thoſe, who are in ſubjection to others, can be freed from that ſubjection. The means, by which ſlaves obtain their liberty, may be fully underſtood by what we have already ſaid in treating of manumiſſion. But thoſe, who are under the power of a parent, become independent at his death; yet this rule admits of a diſtinction. When a father dies his ſons and daughters are, without doubt, independent; but by the death of a grand-father his grand-children do not become independent, unleſs it happens, that there is an impoſſibility of their ever falling under the power of their father. Therefore, if their father is alive at the death of their grand-father and they are 'till then under his power, the grand-children, in this caſe, become ſubject to the power of their father. But, if their father is either dead or emancipated before the death of their grand-father, they then cannot fall under the power of their father, and therefore become independent.

De deportatione.

§ I. Cum autem is, qui ob aliquod maleficium in inſulam deportatur, civitatem amittit: ſequitur, ut qui eo modo ex numero civium Romanorum tollitur, perinde, quaſi eo mortuo, deſinant liberi in poteſtate ejus eſſe. Pari ratione et ſi is, qui in poteſtate parentis ſit, in inſulam deportatus fuerit, deſinit eſſe in poteſtate parentis. Sed, ſi ex indulgentia principis reſtituti fuerint per omnia, priſtinum ſtatum recipiunt.

§ 1. *If a man, upon conviction of ſome crime, is deported into an iſland, he loſes the rights of a* Roman *citizen; and it follows, that the children of ſuch a perſon ceaſe to be under his power, as if he was naturally dead. And, by a parity of reaſoning*

ſoning, if a ſon is deported, he ceaſes to be under the power of his father. But if, by the indulgence of the prince, a criminal is wholly reſtored, he regains inſtantly his former condition.

Deportatur.] Deportation denotes a perpetual baniſhment, and is ſo called, becauſe the criminal is as it were carried from the rights, which he had in his native country; for by this puniſhment, he loſt the birth-right of a citizen, his paternal power, his eſtate, and his right of ſucceſſion.

De relegatione.

§ II. Relegati autem patres in inſulam in poteſtate liberos retinent, et liberi relegati in poteſtate parentum remanent.

§ 2. *A Father, who is relegated, retains his paternal power; and a ſon, who is relegated, ſtill remains under the power of his father.*

Relegati.] Relegation imports either a perpetual or temporary baniſhment. But a ſentence of relegation did not neceſſarily deprive a man of the rights of a citizen; and in general it was a much milder puniſhment, than deportation. *Mynſinger.*

De ſervitute pœnæ.

§ III. Pœnæ ſervus effectus filios in poteſtate habere deſinit. Servi autem pœnæ efficiuntur, qui in metallum damnantur, et qui beſtiis ſubjiciuntur.

§ 3. *When a man is judicially pronounced to be the ſlave of puniſhment, he loſes his paternal juriſdiction. The ſlaves of puniſhment are thoſe, who are condemned to the mines, or ſentenced to be deſtroyed by wild beaſts.*

Servi autem pœnæ.] The ſlaves of puniſhment are ſo called, becauſe they have no other maſter, than the labor or puniſhment to which they are condemned. *Vinn.* h. t.

De dignitate.

§ IV. Filius-familias, ſi militaverit, vel ſi ſenator, vel conſul factus fuerit, remanet in poteſtate patris: militia enim, vel conſularis dignitas, de patris poteſtate filium non liberat. Sed, ex conſtitutione noſtra, ſumma patriciatus dignitas illico, imperialibus codicillis præſtitis, filium a patria poteſtate liberat. Quis enim patiatur, patrem quidem poſſe, per emancipationis modum, poteſtatis ſuæ nexibus filium liberare: imperatoriam autem celſitudinem non valere eum, quem patrem ſibi elegit, ab aliena eximere poteſtate?

§ 4. *If the ſon of a family becomes a ſoldier, a ſenator, or a conſul, he ſtill remains under the power of his father, from which neither the army, the ſenate, nor conſular dignity can emancipate him. But it is enacted by our conſtitution, that the patrician dignity, conferred by our ſpecial diploma, ſhall free every ſon from all paternal ſubjection. For it is abſurd to think, that a parent may emancipate his ſon, and that the power of an emperor ſhould not be ſufficient to make any perſon independent, whom he hath choſen to be a father of the commonwealth; or, in other words, a ſenator.*

Conſtitutione noſtra.] *Cod.* 12. *t.* 3. *l.* 5. *De conſulibus.*

Patriciatus dignitas.] During the republic the title of patricians was conferred on thoſe only, who were the deſcendents of thoſe ſenators, whom *Romulus* had created. And *Livy* teſtifies, that in his time the children of every antient ſenatorial family were nominated patricians.

Patricii

Patricii eorum ſenatorum progenies erant, quos Romulus crearat : hac tamen ætate, antiquiſſimæ cujuſque ſenatoriæ familiæ liberi patricii appellantur. But, after the tranſlation of the ſeat of the empire to *Conſtantinople*, thoſe only were called patricians (*quaſi patres communis reipublicæ*) who, having been curule magiſtrates, were choſen by the emperors to be councillors of ſtate.

De captivitate et poſtliminio.

§ V. Si ab hoſtibus captus fuerit parens, quamvis ſervus hoſtium fiat, tamen pendet jus liberorum, propter jus poſtliminii: quia hi, qui ab hoſtibus capti ſunt, ſi reverſi fuerint, omnia priſtina jura recipiunt: idcirco reverſus etiam liberos habebit in poteſtate : quia poſtliminium fingit eum, qui captus eſt, in civitate ſemper fuiſſe. Si vero ibi deceſſerit, exinde, ex quo captus eſt pater, filius ſui juris fuiſſe videtur. Ipſe quoque filius, nepoſve, ſi ab hoſtibus captus fuerit, ſimiliter dicimus, propter jus poſtliminii, jus quoque poteſtatis parentis in ſuſpenſo eſſe. Dictum autem eſt poſtliminium à *limine* et *poſt*. Unde eum, qui ab hoſtibus captus eſt, et in fines noſtros poſtea pervenit, poſtliminio reverſum recte dicimus. Nam limina ſicut in domo finem quendam faciunt, ſic et imperii finem eſſe limen veteres voluerunt. Hinc et limen dictum eſt, quaſi finis quidam et terminus. Ab eo poſtliminium dictum eſt, quia ad idem limen revertebatur, quod amiſerat. Sed et, qui captus victis hoſtibus recuperatur, poſtliminio rediiſſe exiſtimatur.

§ 5. *If a parent is taken priſoner by the enemy, altho' he thus becomes a ſlave, yet he loſes not his paternal power, which remains in ſuſpenſe by reaſon of a privilege granted to all priſoners; namely, the right of return. For captives, when they obtain their liberty, are repoſſeſſed of all their former rights, in which paternal power of courſe muſt be included: and, at their return, they are ſuppoſed, by a fiction of law, never to have been abſent. If a priſoner dies in captivity, his ſon is deemed to have become independent, not from the time of the death of his father, but from the commencement of his captivity. Alſo, if a ſon, or grand-ſon, becomes a priſoner, the power of the parent is ſaid, for the reaſon before aſſigned, to be only in ſuſpenſe. The term* poſtliminium *is derived from* poſt *and* limen. *We therefore aptly uſe the expreſſion* reverſus poſtliminio, *when a perſon, who was a captive, returns within our own confines.*

De emancipatione, item de modis et effectibus ejuſdem.

§ VI. Præterea emancipatione quoque deſinunt liberi in poteſtate parentum eſſe. Sed emancipatio antea quidem vel per antiquam legis obſervationem procedebat, quæ per imaginarias venditiones et intercedentes manumiſſiones celebrabatur, vel ex imperiali reſcripto. Noſtra autem providentia etiam hoc in melius per conſtitutionem reformavit; ut, fictione priſtina exploſa, recta via ad competentes judices, vel magiſtratus, parentes intrent, et filios ſuos vel filias, vel nepotes vel neptes, ac deinceps, a ſua manu dimittant. Et tunc, ex edicto prætoris in bonis ejuſmodi filii vel filiæ, vel nepotis vel neptis, qui quæve à parente manumiſſus vel manumiſſa fuerit, eadem jura præſtantur parenti, quæ tribuuntur patrono in bonis liberti. Et

præterea, ſi imbubes ſit filius, vel filia, vel cæteri, ipſe parens ex manumiſſione tutelam ejus nanſciſcitur.

§ 6. *Children alſo ceaſe to be under the power of their parents by emancipation. Emancipation was effected according to our antient law, either by imaginary ſales and intervening manumiſſions, or by the imperial reſcript; but it has been our care to reform theſe ceremonies by an expreſs conſtitution, ſo that parents may now have immediate recourſe to the proper judge or magiſtrate, and emancipate their children, grand-children,* &c. *of both ſexes. And alſo, by a prætorian edict, the parent is allowed to have the ſame right in the goods of thoſe, whom he emancipates, as a patron has in the goods of his freed-man. And farther, if the children emancipated are within the age of puberty, the parent, by whom they were emancipated, obtains the right of wardſhip or tutelage, by the emancipation.*

Emancipatio antea quidem.] It was enacted by a law of the twelve tables, "that a ſon was "not free from paternal power, 'till he had been "thrice ſold by his father." *Si pater filium ter venumduit, filius a patre liber eſto.* Thus the condition of a ſon was worſe than that of a ſlave. But, altho' this law ſoon loſt it's force, yet the formal part of it was retained, and three ſales were ſtill thought requiſite to effect the emancipation of a ſon, altho' they were but imaginary. There was therefore always a feigned contract, made between the father and a perſon, whom he could confide in, called *pater fiduciarius*, who after every ſale reſtored the ſon into the hands of his father. The emperor *Anaſtatius* was the firſt, who diſpenſed with theſe fiduciary ſales by his reſcript; but *Juſtinian* entirely aboliſhed them, having ordained, "that all pa-"rents might emancipate their children with-"out the obſervance of ſuch vain ceremonies." *Cum inſpeximus in emancipationibus vanam obſervationem cuſtodiri, et venditiones in liberas perſonas figuratas, &c. quorum nullus rationabilis invenitur exitus, &c.* C. 8. t. 49. *l.* 6.

Si alii emancipentur, alii retineantur in poteſtate.

§ VII. Admonendi autem ſumus, liberum arbitrium eſſe ei, qui filium, et ex eo nepotem vel neptem, in poteſtate habet, filium quidem de poteſtate dimittere, nepotem vero vel neptem retinere: et, è converſo, filium quidem in poteſtate retinere, nepotem vero vel neptem manumittere: vel omnes ſui juris efficere. Eadem et de pronepote et pronepte dicta eſſe intelliguntur.

§ 7. *A parent having a ſon under his power, and by that ſon a grandſon or grand-daughter, may emancipate his ſon, and yet retain his grandſon or grand-daughter in ſubjection. He may alſo manumit his grandſon or grand-daughter, and ſtill retain his ſon under his power; or, if he is ſo diſpoſed, he may make them all independent. And the ſame may be ſaid of a great-grandſon, or a great-grand-daughter.*

De adoptione.

§ VIII. Sed et ſi pater filium, quem in poteſtate habet, avo, vel proavo naturali, ſecundum noſtras conſtitutiones ſuper his habitas, in adoptionem dederit, id eſt, ſi hoc ipſum actis intervenientibus apud competentem judicem manifeſtaverit, præſente eo, qui adoptatur, et non contradicente, nec non eo præſente, qui adoptat, ſolvitur quidem jus poteſtatis patris naturalis; tranſit autem in hujuſmodi parentem adoptivum, in cujus perſona et adoptionem eſſe pleniſſimam antea diximus.

§ 8. *If a father gives his ſon in adoption to the natural grand-father or great-grand-father of ſuch ſon, ſtrictly adhering to the rules laid down in our conſtitutions for*

for that purpoſe enacted, which injoin the parent to make his intention manifeſt before a competent judge, in the preſence of the perſon to be adopted, in no wiſe contradicting, and alſo in the preſence of the adoptor, then does the right of paternal power paſs wholly from the natural father to the adoptive, in whoſe perſon, as we have before obſerved, adoption has it's fulleſt extent.

Secundum noſtras conſtitutiones.] *C.* 8. *t.* 48. *ll.* 10. 11. *De adoptionibus.*

De nepote nato poſt filium emancipatum.

§ IX. Illud ſcire oportet, quod ſi nurus tua ex filio tuo conceperit, et filium tuum emancipaveris, vel in adoptionem dederis, prægnante nuru tua, nihilominus, quod ex ea naſcitur, in poteſtate tua naſcitur. Quod ſi poſt emancipationem vel adoptionem conceptus fuerit, patris ſui emancipati, vel avi adoptivi, poteſtati ſubjicitur.

§ 9. *It is neceſſary to be known, that, if a ſon's wife hath conceived, and you afterwards emancipate that ſon or give him in adoption, his wife being pregnant, the child, which ſhe brings forth, will, notwithſtanding this, be born under your paternal authority. But, if the conception is ſubſequent to the emancipation or adoption, the child ſo conceived becomes ſubject, at his birth, either to his emancipated father, or his adoptive grand-father.*

Patris ſui emancipati, vel avi adoptivi.] In *England*, if a man hath a wife, and dieth, and within a very ſhort time after the wife marrieth again, and within nine months hath a child, ſo as it may be the child of the one, or of the other, ſome have ſaid, that in this caſe the child may chuſe his father, quia filiatio non poteſt probari: For avoiding of which queſtion, and other inconveniences, this was the law before the conqueſt: Sit omnis vidua ſine marito duodecem menſibus, et, ſi maritaverit, perdat dotem. *Co. Litt.* 8. a. *ll. Anglo-Sax.* Wilkins, *Ed.* 109. 122. 144.

By the civil law a ſecond marriage, in man or woman, is condemned, tho' not abſolutely forbidden. But a widow is prohibited to marry, *infra annum luctus*, under ſevere penalties.

Si qua ex fœminis, perdito marito, infra anni ſpatium alteri feſtinaverit nubere (parvum enim tempus poſt decem menſes ſervandum adjicimus, tamen id ipſum exiguum putemus) probroſis inuſta notis, honeſtioris nobiliſque perſonæ decore et jure privetur: atque omnia, quæ de prioris mariti bonis, vel jure ſponſalium, vel judicio defuncti conjugis, conſecuta fuerat, amittat. Imppp. Gratianus, Valentinianus, et Theodoſius AAA. Eutropio P.P. *Cod.* 5. *t.* 9.

An parentes cogi poſſunt liberos ſuos de poteſtate dimittere?

§ X. Et quidem neque naturales liberi, neque adoptivi, ullo pene modo poſſunt cogere parentes de poteſtate ſua eos dimittere.

§ 10. *Children, either natural or adopted, can rarely compel their parents by any method to diſmiſs them from ſubjection.*

Ullo pene modo.] It is true in general, that parents could not be obliged to emancipate their children, and that their children could not be compelled to be emancipated. But theſe rules were not without exception: for a ſon might have compelled his father to emancipate him on various accounts, but particularly for cruelty. *Divus Trajanus filium, quem pater malè contra pietatem adficiebat, coëgit emancipare.* D. 37. t. 12. *l.* 5. D. 35. t. 1. *l.* 50. Cod. 1. t. 4. *l.* 12. D. 1. t. 7. *l.* 32.

And a father might alſo have forced his ſon to be emancipated in all caſes, which would have juſtified him in diſinheriting ſuch ſon. *vid. Bart. in l.* 132. *D.* 45. *t.* 1. *Mynſ. h. t.*

TITULUS DECIMUS-TERTIUS.

De tutelis.

D. xxvi. T. 1. Nov. 72.

De perſonis ſui juris.

TRanſeamus nunc ad aliam diviſionem perſonarum. Nam ex his perſonis, quæ in poteſtate non ſunt, quædam vel in tutela ſunt, vel in curatione, quædam neutro jure tenentur. Videamus ergo de his, quæ in tutela vel curatione ſunt: ita enim intelligemus cæteras perſonas, quæ neutro jure tenentur. Ac prius diſpiciamus de his, qui in tutela ſunt.

Let us now proceed to another diviſion of perſons. Of thoſe, who are not in the power of their parents, ſome are under tutelage, ſome under curation, and ſome under neither. Let us then inquire what perſons are under tutelage and curation; for thus we ſhall come to the knowledge of thoſe, who are not ſubject to either. We will firſt treat of ſuch perſons, who are under tutelage.

In tutela vel curatione.] By the law of *England* the term guardianſhip denotes either the tutelage or the curation of minors; and of guardianſhip there are three kinds, by *common law*, by *ſtatute*, and by *particular cuſtom*. Firſt, By *common law* there were formerly four ſpecies of guardians; but guardianſhip in chivalry having been taken away by 12 *Car.* 2, there now remain but three, *viz.* guardianſhip by *nature*, by *nurture*, and in *ſocage*. 3 *Co. rep.* 37. *b.*

Secondly, by *ſtatute*; for by 4 and 5 *Ph.* and *M. cap.* 8. a father, or mother, after the father's death, without aſſignation, are guardians of women-children. And by 12 *Car.* 2. "A father under "age, or of full age, by deed in his life-time, "or by will, in preſence of two witneſſes, may "diſpoſe the cuſtody of his child under twenty-"one years of age, and not married at the time "of his death, whether then born, or *in ventre* "*ſa mere*, during his non-age, to any in poſſeſ-"ſion or remainder, other than to Popiſh re-"cuſants: which perſons may maintain any "action of treſpaſs againſt wrongful takers-"away, and detainers of ſuch child, and reco-"ver damages for the child's uſe, and may "take into their cuſtody his lands and perſo-"nal eſtate, according to ſuch diſpoſition, and "bring actions, as guardian in ſocage might "do.

Before this act, a tenent in ſocage, of age, might have diſpoſed of his lands by deed, or laſt will, in truſt for his heir, but not the cuſtody of his heir; for the law gave that to the next of kin, to whom the land could not deſcend. *Vaugh.* 178.

And 3dly, By *particular cuſtom*, as in *London*, where the tuition of orphans unmarried, who are the children of freemen, belongs by cuſtom to the city. *Co. Litt.* 88. *b.*

Tutelæ definitio.

§ I. Eſt autem tutela (ut *Servius* definivit) vis ac poteſtas in capite libero, ad tuendum eum, qui per ætatem ſe defendere nequit, jure civili data ac permiſſa.

§ 1. *Tutelage, as* Servius *has defined it, is an authority and power, given and permitted by the civil law, and exerciſed over ſuch independent perſons, who are unable, by reaſon of their age, to protect themſelves.*

De

Definitio et etymologia tutoris.

§ II. Tutores autem ſunt, qui eam vim ac poteſtatem habent; exque ipſa re nomen acceperunt. Itaque appellantur tutores, quaſi tuitores atque defenſores; ſicut æditui dicuntur, qui ædes tuentur.

§ 2. *Tutors are thoſe, who have the authority and power before mentioned; and they take their name from the nature of their office. For they are called tutors,* quaſi tuitores; *as thoſe, who have the care of the ſacred buildings, are called* æditui, quod ædes tueantur.

Quibus teſtamento tutor datur: et primum, de liberis in poteſtate.

§ III. Permiſſum eſt itaque parentibus liberis impuberibus, quos in poteſtate habent, teſtamento tutores dare. Et hoc in filios filiaſque procedit omnimodo: nepotibus vero neptibuſque ita demum parentes poſſunt teſtamento tutores dare, ſi poſt mortem eorum in poteſtatem patris ſui non ſunt recaſiuri. Itaque, ſi filius tuus mortis tuæ tempore in poteſtate tua ſit, nepotes ex eo non poterunt ex teſtamento tuo tutores habere, quamvis in poteſtate tua fuerint: ſcilicet, quia, mortuo te, in poteſtatem patris ſui recaſiuri ſunt.

§ 3. *Parents are permitted to aſſign tutors by teſtament to ſuch of their children, who are not arrived at puberty, and are under their power. And this privilege of parents extends without exception over ſons and daughters. But grand-fathers can only give tutors to their grand-children, when it is impoſſible, that ſuch grand-children ſhould ever fall under the power of their father, after the death of their grand-father. And therefore, if your ſon is in your power at the time of your death, your grand-children by that ſon can not receive tutors by your teſtament, altho' they were actually in your power, becauſe at your deceaſe they will become ſubject to their father.*

Tutores dare.] Becauſe after puberty curators only can be appointed.

De poſthumis.

§ IV. Cum autem in compluribus aliis cauſis poſthumi pro jam natis habeantur, et in hac cauſa placuit non minus poſthumis, quam jam natis, tutores dari poſſe; ſi modo in ea cauſa ſint, ut, ſi vivis parentibus naſcerentur, ſui hæredes et in poteſtate eorum fierent.

§ 4. *As poſthumous children are in many caſes reputed to have been born before the death of their fathers; therefore tutors may be given by the teſtament of a parent as well to a poſthumous child, as to a child already born, if ſuch poſthumous child, had he been born in the life-time of his father, would have been his proper heir and under his power.*

De emancipatis.

§ V. Sed et, ſi emancipato filio tutor à patre datus fuerit teſtamento, confirmandus eſt ex ſententia præſidis omnimodo, id eſt, ſine inquiſitione.

§ 5. *But, if a father gives a tutor by teſtament to his emancipated ſon, ſuch tutor muſt be confirmed by the ſentence of the governor of the province without inquiſition.*

Sine inquiſitione.] Τουτεστιν, ουκ ἐπιζητησας, ποτερον ἐυπορος ἡ, ἡ των δυναμενων τα του νεου διοικειν πραγματα, ἀρκουσης αὐτῳ, προς τελειωτατην τουτων παρασκευην, της του τελευτησαντος μαρτυριας. That is, without inquiring, whether the perſon appointed to be a tutor is in good circumſtances, or whether he is otherwiſe qualified to conduct the affairs of his pupil: for, in relation to theſe points, the ſole teſtimony of the deceaſed gives a perfect ſatisfaction. *Theoph. h. t.*

TITULUS DECIMUS-QUARTUS.

Qui teſtamento tutores dari poſſunt.

D. XXVI. T. 2. C. V. T. 28.

Qui tutores dari poſſunt.

DARI autem tutor poteſt teſtamento non ſolum pater-familias, ſed etiam filius-familias.

Not only the father of a family may be appointed by teſtament to be a tutor, but alſo the ſon of a family.

De ſervo.

§ I. Sed et ſervus proprius teſtamento cum libertate recte tutor dari poteſt: ſed ſciendum eſt, et ſine libertate tutorem datum tacite libertatem directam accepiſſe videri; et per hoc recte tutorem eſſe. Plane ſi per errorem, quaſi liber, tutor datus ſit, aliud dicendum eſt. Servus autem alienus *pure* inutiliter teſtamento datur tutor: ſed ita, *cum liber erit*, utiliter datur. Proprius autem ſervus inutiliter eo modo tutor datur.

§ 1. *A man may by teſtament aſſign his own ſlave to be a tutor with liberty. But note, that, if a maſter by teſtament appoints his ſlave to be a tutor without mentioning liberty, ſuch ſlave ſeems tacitly to have received immediate liberty, and is thus legally inabled to commence a tutor: yet, if a teſtator thro' error, imagining his ſlave to be a free perſon, by teſtament appoints him, as ſuch, to be a tutor, the appointment will not avail. Alſo the abſolute appointment of another man's ſlave to be a tutor is altogether ineffectual: but, if the appointment is upon condition, that the perſon appointed obtains his freedom, then it is made profitably: but, if a man by teſtament appoints his own ſlave to be a tutor,* when he ſhall obtain his liberty, *the appointment will be void.*

De furioſo et minore viginti-quinque annis.

§ II. Furioſus, vel minor viginti-quinque annis, tutor teſtamento datus, tutor tunc erit, cum compos mentis, aut major viginti-quinque annis, fuerit factus.

§ 2. *If a madman, or a minor, is by teſtament appointed to be a tutor, the one ſhall begin to act, when he becomes of ſound mind, and the other, when he has completed his twenty-fifth year.*

Furioſus vel minor.] The ſame law is alſo obſerved in *England*, in reſpect to madmen and minors. But it muſt be noted, that with us the minority of all perſons determines at the age of twenty-one years complete. *Co. Litt.* 78. *b.*

Quibus modis tutores dantur.

§ III. Ad certum tempus, vel ex certo tempore, vel ſub conditione, vel ante hæredis inſtitutionem, poſſe dari tutorem non dubitatur.

§ 3. *It is not doubted, but that a teſtamentary tutor may be given either* to *a certain time, or* from *a certain time, or conditionally, or before the inſtitution of an heir.*

Ad certum tempus.] *e. g.* Let *Titius* be my ſon's tutor 'till the calends of *December*.

Ex certo tempore.] *e. g.* Let *Titius* commence to be my ſon's tutor after the expiration of two years.

Sub conditione.] *e. g.* Let *Titius* take upon him the tutelage of my ſon, if the ſhip *Argo* returns from *Aſia*.

Ante hæredis inſtitutionem.] *e. g.* Let *Titius* be tutor to my ſon, and let *Titius* alſo be my heir.

It muſt here be obſerved, that the civil law calls him heir, who ſucceeds to the whole eſtate of another, whether it is real or perſonal.

But, by the law of *England*, he only is heir, who ſucceeds to a real eſtate of inheritance by the act of God, and by right of blood. *Co. Litt.* 237. *b.* And he, who ſucceeds to perſonal eſtate, or goods, is in law called an executor, if he ſucceeds by the appointment of the deceaſed in his laſt will; or adminiſtrator, if he ſucceeds by the appointment of the ordinary.

Cui dantur.

§ IV. Certæ autem rei, vel cauſæ, tutor dari non poteſt: quia perſonæ, non cauſæ vel rei, tutor datur.

§ 4. *A tutor cannot be aſſigned to any particular thing, or upon any certain account, but can only be given to perſons.*

De tutore dato filiabus, vel filiis, vel liberis, vel nepotibus.

§ V. Si quis filiabus ſuis, vel filiis, tutores dederit, etiam poſthumæ vel poſthumo dediſſe videtur: quia, filii vel filiæ appellatione, et poſthumus et poſthuma continentur. Quod ſi nepotes ſint, an appellatione filiorum et ipſis tutores dati ſint? Dicendum eſt, ut et ipſis quoque dati videantur, ſi modo liberos dixerit: cæterum, ſi filios, non continebuntur. Aliter enim filii, aliter nepotes appellantur. Plane, ſi poſthumis dederit, tam filii poſthumi, quam cæteri liberi, continebuntur.

§. 5. *If a man by teſtament nominates a tutor for his ſons or his daughters, the ſame perſon ſeems alſo to be appointed tutor to his poſthumous iſſue; becauſe, under the appellation of ſon or daughter, a poſthumous child is comprehended. But, ſhould it be queſtioned, whether grand-children are denoted by the word ſons, and can receive tutors by that denomination, we anſwer, that under the general term,* children, *grand-children are undoubtedly included, but that the word ſons does not comprehend them: for the word ſon, and grandſon, widely differ in their ſignification. But, if a teſtator aſſigns a tutor to his deſcendents, it is evident, that not only his poſthumous ſons are comprehended, but all his other children.*

TITU-

TITULUS DECIMUS-QUINTUS.

De legitima agnatorum tutela.

D. xxvi. T. 4. C. v. T. 30.

Summa.

QUIBUS autem teſtamento tutor datus non eſt, his, ex lege duodecim tabularum, agnati ſunt tutores, qui vocantur legitimi.

The Agnati *are, by the law of the twelve tables, appointed to be tutors to thoſe, to whom no teſtamentary tutor was given; and theſe tutors are called legitime.*

Quibus autem.] By a law in the twelve tables, if a man died inteſtate and had no children, the *agnati* were called to the legitime inheritance. But, if the inteſtate had a child, the *agnati* were then called to the legitime tutelage. For it was the opinion of the *Romans*, that as the next heir to the pupil was moſt intereſted in the eſtate, he was therefore the moſt proper perſon to take care of it. But *Solon* was of a very different opinion. *Lege autem* Solonis (ſays *Laertius*) *tutela non deferebatur* agnatis, *niſi remotioribus, contraria habita ratione, quod fere quiſque conatur eum, quem proximus hæres inſequitur, expungere.* Vinn. And our own law goes ſtill farther; for he, who is guardian in ſocage, muſt be the next of blood, who can never inherit: for example, if the lands of a minor deſcended to him from his mother, then the wardſhip belongs to the uncle on the ſide of the father; but, if the lands of a minor deſcended from his father, then the uncle on the mother's ſide muſt be guardian in ſocage. And the ſame rule ought alſo to be obſerved for the common benefit of all minors, whoſe inheritances do not lie in tenure. *Co. Litt.* 87. *b.*

Qui vocantur legitimi.] Theſe tutors are called legitime, becauſe tutelage, when there is no teſtamentary tutor, devolves upon the *agnati* merely by the act of the law, without the intervention of any magiſtrate. *Quippe legitimos tutores nemo dat.* ff. 26. t. 4. *l.* 5.

Qui ſunt agnati.

§ I. Sunt autem agnati cognati, per virilis ſexus cognationem conjuncti, quaſi à patre cognati: veluti frater ex eodem patre natus, fratris filius, nepoſve ex eo: item patruus et patrui filius, nepoſve ex eo. At, qui per fœminini ſexus perſonas cognatione junguntur, agnati non ſunt, ſed alias naturali jure cognati. Itaque amitæ tuæ filius non eſt tibi agnatus, ſed cognatus: et invicem tu illi eodem jure conjungeris: quia, qui ex ea naſcuntur, patris, non matris, familiam ſequuntur.

§ 1. Agnati *are thoſe, who are collaterally related to us by males, as a brother by the ſame father, or the ſon of a brother, or by him a grandſon; alſo a father's brother, or the ſon of ſuch brother, or by him a grandſon. But thoſe, who are related to us by a female, are not ſaid to be* agnate, *but* cognate, *bearing only a natural relation to us. Thus the ſon of a father's ſiſter is not related to you by* agnation, *but by* cognation, *and you are related to him in the ſame manner; that is, by cognation; for the children of a father's ſiſter follow the family of their father, and not that of their mother.*

Sunt autem agnati.] The diſtiction, between the *agnati* and *cognati*, is intirely taken away by *Juſtinian.* Nov. 118. cap. 4, 5.

Quis

Quis dicatur inteſtatus.

§ II. Quod autem lex duodecim tabularum ab inteſtato vocat ad tutelam agnatos, non hanc habet ſignificationem, ſi omnino non fecerit teſtamentum is, qui poterat tutores dare; ſed ſi, quantum ad tutelam pertinet, inteſtatus deceſſerit: quod tunc quoque accidere intelligitur, cum is, qui datus eſt tutor, vivo teſtatore deceſſerit.

§ 2. *The law of the twelve tables, in calling the* agnati *to tutelage in caſe of inteſtacy, relates not ſolely to perſons altogether inteſtate, in whoſe power it was to have appointed a tutor, but extends alſo to thoſe, who are inteſtate only in reſpect to tutelage; and this may happen, if a tutor, nominated by teſtament, ſhould die in the lifetime of the teſtator.*

Quibus modis agnatio, vel cognatio, finitur.

§ III. Sed agnationis quidem jus omnibus modis capitis diminutione plerumque perimitur: nam agnatio juris civilis nomen eſt; cognationis vero jus non omnibus modis commutatur: quia civilis ratio civilia quidem jura corrumpere poteſt, naturalia vero non utique.

§ 3. *The right of agnation is taken away by almoſt every diminution, or change of ſtate; for agnation is but a name given by the civil law. But the right of cognation is not thus altered; for altho' civil policy may extinguiſh civil rights, yet over our natural rights it has no ſuch power.*

TITULUS DECIMUS-SEXTUS.

De capitis diminutione.

D. iv. T. 5.

Definitio et diviſio.

EST autem capitis diminutio prioris ſtatus mutatio: eaque tribus modis accidit. Nam aut maxima eſt capitis diminutio, aut minor, (quam quidam mediam vocant) aut minima.

Diminution is the change of a man's former condition, which is effected three ways, according to the threefold diviſion of diminution into the greater, the leſs, and the leaſt.

De maxima capitis diminutione.

§ I. Maxima capitis diminutio eſt, cum aliquis ſimul et civitatem et libertatem amittit, quod accidit his, qui ſervi pœnæ efficiuntur atrocitate ſententiæ: vel libertis, ut ingratis erga patronos condemnatis; vel his, qui ſe ad pretium participandum venundari paſſi ſunt.

§ 1. *The greater diminution is, when a man loſes both the right of a citizen and his liberty, which is the caſe of thoſe, who by the rigor of their ſentence are pronounced to be the ſlaves of puniſhment.—— And of freedmen, who are condemned to ſlavery for ingratitude to their patrons.—— And of all ſuch, who ſuffer themſelves to be ſold, in order to become ſharers of the price.*

Vel libertis ut ingratis.] In *England*, if a villein was once manumitted, altho' he afterwards became ungrateful in the higheſt degree, yet the manumiſſion remained good. 1 *Inſt.* 137. *b.* *Libertinum ingratum leges civiles in priſtinam redigunt ſervitutem, ſed leges Angliæ ſemel manumiſſum ſemper liberum judicant gratum et ingratum.* Fort. de laud. *ll. Angliæ*, cap. 46.

Ingratis.] The emperor *Claudius* firſt inflicted this puniſhment upon libertines or freed-men. *Ingratos libertinos* (ſays *Suetonius*) *et de quibus patroni quererentur, revocavit in ſervitutem.*

And *Conſtantine* afterwards promulged a law to the ſame effect.

Imp. Conſtant. *ad* Maximum.

Si manumiſſus ingratus circa patronum ſuum extiterit, et, quadam jactantia vel contumacia, cervicem adverſus eum erexit, a patrono rurſus ſub imperium ditionemque mittatur. Cod. 6. t. 7. *l.* 2. ann. Dom. 319.

But thus far the *Romans* only copied from the *Athenians*, who permitted a patron to bring an action called ἀποστασιον againſt ſuch freed-perſons, who had been remiſs in their duty, and to reduce them to their priſtin ſtate of bondage, if the charge was proved. *Archæologia Græc.* vol. 1. p. 153.

And, in the year 367, the emperors *Valentinian, Valens*, and *Gratian*, enacted, "that children, who had behaved ungratefully after "emancipation, ſhould forfeit their liberty by "being reduced under the power of their pa-"rents.

Imppp. Valentin. Valens, *et* Gratianus, A A A.

Filios (et filias, cæteroſque liberos) contumaces, qui parentes, vel acerbitate convitii, vel cujuſcunque atrocis injuriæ dolore, pulſaſſent, leges emancipatione reſciſſa damno libertatis immeritæ multari voluerunt. Cod. 7. t. 50. *l.* un.

But the emperor *Juſtinian* was not content, that the law againſt ingratitude ſhould take place in regard only to freed-men and emancipated children, but extended it in the caſe of donations to all his ſubjects in general.

Imp. Juſtinianus A. Juliano, *PP.*

"Generaliter ſancimus, omnes donationes, "lege confectas, firmas illibataſque manere, ſi "non donationis acceptor ingratus circa donatorem inveniatur, ita ut injurias atroces in "eum effundat, vel manus impias inferat, vel "jacturæ molem ex inſidiis ſuis ingerat, quæ "non levem cenſum ſubſtantiæ donatoris impo-"nat, vel vitæ periculum aliquod ei intulerit; "vel quaſdam conventiones, ſive in ſcriptis "donationi impoſitas, ſive ſine ſcriptis habitas, "quas donationis acceptor ſpoſpondit, minime "implere voluerit. Ex his enim tantummodo "cauſis, ſi fuerint in judicium dilucidis argu-"mentis cognitionaliter approbatæ, etiam do-"nationes in eos factas everti concedimus; ne "ſit cuiquam licentia, et alienas res capere, et "frugalitatem irridere donatoris, et ipſum ite-"rum donatorem ſuaſque res perdere; et præ-"fatis malis ab ingrato donationis acceptore af-"fici. Hoc tamen uſque ad primas perſonas "tantummodo ſtare cenſemus, nulla licentia "concedenda donatoris ſucceſſoribus hujuſmodi "querimoniarum primordium inſtituere. Ete-"nim ſi ipſe, qui hoc paſſus eſt, tacuerit, ſilen-"tium ejus maneat ſemper, et non a poſterita-"te ejus ſuſcitari concedatur, vel adverſus eum, "qui ingratus eſſe dicitur, vel adverſus ejus "ſucceſſores." *C.* 8. *t.* 56. *l.* 10.

De media.

§ II. Minor, ſive media, capitis diminutio eſt, cum civitas quidem amittitur, libertas vero retinetur; quod accidit ei, cui aqua et igni interdictum fuerit, vel ei, qui in inſulam deportatus eſt.

§ 2. *The leſs or meſne diminution is, when a man loſes the rights of a citizen, but retains his liberty; which happens to him, who is forbidden the uſe of fire and water, or to him who is deported into an iſland.*

De minima.

§ III. Minima capitis diminutio eſt, cum civitas retinetur et libertas, ſed ſtatus hominis commutatur: quod accidit his, qui cum ſui juris fuerint,

rint, cœperunt alieno juri ſubjecti eſſe; vel contra, veluti ſi filius-familias à patre emancipatus fuerit, eſt capite diminutus.

§ 3. *The leaſt diminution is then ſaid to have been ſuffered, when the condition of a man is changed without the forfeiture either of his civil rights, or his liberty: as when he, who is independent, becomes ſubject by adoption: or when the ſon of a family hath been emancipated by his father.*

De ſervo manumiſſo.

§ IV. Servus autem manumiſſus capite non minuitur: quia nullum caput habuit.

§ 4. *The manumiſſion of a ſlave works not any change of ſtate in him, becauſe he had, before manumiſſion, no ſtate or civil capacity.*

De mutatione dignitatis.

§ V. Quibus autem dignitas magis quam ſtatus permutatur, capite non minuuntur, et ideo, à ſenatu motos capite non minui, conſtat.

§ 5. *Thoſe, whoſe dignity is rather changed than their ſtate, are not ſaid to have ſuffered diminution; and therefore it appears, that they, who are removed from the ſenatorial dignity, do not ſuffer diminution.*

Interpretatio § ult. ſup. tit. prox.

§ VI. Quod autem dictum eſt, manere cognationis jus etiam poſt capitis diminutionem, hoc ita eſt, ſi minima capitis diminutio interveniat: manet enim cognatio. Nam, ſi maxima capitis diminutio interveniat, jus quoque cognationis perit, ut puta ſervitute alicujus cognati; et ne quidem, ſi manumiſſus fuerit, recipit cognationem. Sed et, ſi in inſulam quis deportatus ſit, cognatio ſolvitur.

§ 6. *What has already been ſaid in a ſection of the preceding title, to wit, that the right of cognation remains after diminution, relates only to the leaſt diminution. For, by the greater diminution, as for inſtance, by ſervitude, the right of cognation is wholly deſtroyed, even ſo as not to be recovered by manumiſſion. The right of cognation is alſo loſt by the leſs or meſne diminution, as by deportation into an iſland.*

Ad quos agnatos tutela pertinet.

§ VII. Cum autem ad agnatos tutela pertineat, non ſimul ad omnes pertinet, ſed ad eos tantum, qui proximiore gradu ſunt: vel ſi plures ejuſdem gradus ſunt, ad omnes pertinet; veluti ſi plures fratres ſunt, qui unum gradum obtinent, pariter ad tutelam vocantur.

§ 7. *Altho' the right of tutelage belongs to the* agnati, *yet it belongs not to all the* agnati *in common, but to thoſe only, who are in the neareſt degree. But, if there are many in the ſame degree, the tutelage belongs to all of them, however numerous. For example, if there are ſeveral brothers, they are all called equally to tutelage.*

TITULUS DECIMUS-SEPTIMUS.

De legitima patronorum tutela.

D. xxvi. T. 4. C. v. T. 30.

Ratio, ob quam patronorum tutela dicitur legitima.

EX eadem lege duodecim tabularum, libertorum et libertarum tutela ad patronos liberoſque eorum pertinet, quæ et ipſa legitima tutela vocatur; non quia nominatim in ea lege de hac tutela caveatur; ſed quia perinde accepta eſt per interpretationem, ac ſi verbis legis introducta eſſet. Eo enim ipſo, quod hæreditates libertorum libertarumque, ſi inteſtati deceſſiſſent, juſſerat lex ad patronos liberoſve eorum pertinere, crediderunt veteres, voluiſſe legem, etiam tutelas ad eos pertinere; cum et agnatos, quos ad hæreditatem lex vocat, eoſdem et tutores eſſe juſſerit; quia plerumque ubi ſucceſſionis eſt emolumentum, ibi et tutelæ onus eſſe debet. Ideo autem diximus *plerumque*, quia ſi fœmina impubes manumittatur, ipſa ad hereditatem vocatur, cum alius ſit tutor.

By the ſame law of the twelve tables, the tutelage of freed-men, and freed-women, is adjudged to belong to their patrons, and to the children of ſuch patrons: and this tutelage is called legitime, altho' it exiſts not nominally in the law; but it is as firmly eſtabliſhed by interpretation, as if it had been introduced by expreſs words. For inaſmuch as the law commands, that patrons and their children ſhall ſucceed to the inheritance of their freed-men or freed-women, who die inteſtate, it was the opinion of the antient lawyers, that tutelage alſo by implication ſhould belong to patrons and their children. And the law, which calls the agnati *to the inheritance, commands them to be tutors, becauſe the advantage of ſucceſſion ought to be attended in moſt caſes with the burden of tutelage. We have ſaid, in* moſt caſes, *becauſe when any perſon, not arrived at puberty, is manumitted by a female, ſuch female is called to the inheritance, but not to the tutelage.*

Cum alius ſit tutor.] The tutelage of a child, by the civil law, could not regularly be committed to a woman.

Fœminæ tutores dari non poſſunt, quia id munus maſculorum eſt. ff. 26. t. 1. *l.* 18. *de tutelis.*

But the mother or grandmother was allowed by conſtitution to execute this office upon condition, that ſhe bound herſelf ſolemnly not to contract a ſecond marriage. *Cod.* 5. *t.* 35. *l.* 2. *Nov.* 118. *cap.* 5.

But in *England* women, as well as men, are equally permitted to become Guardians.

TITU-

TITULUS DECIMUS-OCTAVUS.

De legitima parentum tutela.

EXEMPLO patronorum recepta eſt et alia tutela, quæ et ipſa legitima vocatur; nam, ſi quis filium aut filiam, nepotem aut neptem ex filio, et deinceps, impuberes emancipaverit, legitimus eorum tutor erit.

In ſimilitude of the tutelage of patrons, another kind of tutelage is received, which is alſo called legitime; for if any parent emancipates a ſon or a daughter, or a grandſon or a grand-daughter, the iſſue of that ſon, or any others deſcended from him by males in a right line and not arrived at puberty, then ſhall ſuch parent be their legitime tutor.

TITULUS DECIMUS-NONUS.

De fiduciaria tutela.

Filii-familias a patre manumiſſi pater tutor eſt legitimus; eo vero defuncto, frater tutor fiduciarius exiſtit.

EST et alia tutela, quæ fiduciaria appellatur: nam, ſi parens filium vel filiam, nepotem vel neptem, vel deinceps, impuberes manumiſerit, legitimam nanciſcitur eorum tutelam. Quo defuncto, ſi liberi ejus virilis ſexus exiſtant, fiduciarii tutores filiorum ſuorum, vel fratris, vel ſororis, vel cæterorum, efficiuntur. Atqui, patrono legitimo tutore mortuo, liberi quoque ejus legitimi ſunt tutores, quoniam filius quidem defuncti, ſi non eſſet à vivo patre emancipatus, poſt obitum ejus ſui juris efficeretur, nec in fratrum poteſtatem recideret, ideoque nec in tutelam. Libertus autem, ſi ſervus manſiſſet, utique eodem jure apud liberos domini poſt mortem ejus futurus eſſet. Ita tamen hi ad tutelam vocantur, ſi perfectæ ſint ætatis; quod noſtra conſtitutio in omnibus tutelis et curationibus obſervari generaliter præcepit.

There is another kind of tutelage called fiduciary; for, if a parent manumits a ſon or a daughter, a grandſon or a grand-daughter, or any other of his children, not arrived at puberty, he is then their legitime tutor: but, at his death, his male children of age become the fiduciary tutors of their own ſons, or of a brother, a ſiſter, or of any other children emancipated by the deceaſed. But, when a patron, who is a legitime tutor, dies, his children alſo become legitime tutors. The reaſon of which difference is this: a ſon, altho' he was never emancipated, becomes independent at the death of his father; and therefore, as he falls not under the power of his brothers, it follows, that he can not be under their legitime tutelage. But the condition of a ſlave is not altered at the death of his maſter; for he then becomes a ſlave to the children of the deceaſed.

deceaſed. It muſt here be noted, that the perſons above mentioned can not be called to tutelage, unleſs they are of full age; and our conſtitution hath in general commanded this rule to be obſerved in all tutelages and curations.

Si perfectæ ſint ætatis.] No man is ſaid, by the civil law, to be *perfectæ ætatis*, until the twenty-fifth year of his age is completed. *Si quis abſolute dixerit perfectæ ætatis, illam tantummodo ætatem intellectam eſſe videri volumus, quæ et viginti-quinque annorum curriculis completur.* Cod. 5. t. 45. *l.* ult.

TITULUS VIGESIMUS.

De Attiliano tutore, et eo, qui ex lege Julia et Titia dabatur.

D. xxvi. T. 5. C. v. T. 34 et 36.

Jus antiquum, ſi nullus ſit tutor.

SI cui nullus omnino tutor fuerat, ei dabatur, in urbe quidem à prætore urbano et majore parte tribunorum plebis, tutor ex lege Attilia: in provinciis vero à præſidibus provinciarum ex lege Julia et Titia.

By virtue of the law Attilia, *the prætor of the city, with a majority of the tribunes, had authority to aſſign tutors to all ſuch, who otherwiſe were not intituled to tutors: but, in the provinces, tutors were appointed by the reſpective governors of each province, in conſequence of the law* Julia *and* Titia.

Ex lege Attilia.] The law *Attilia* was a Plebiſcite, made in the year *U. C.* 444, by *Lucius Attilius* and *Caius Martius*, tribunes of the people. *Muretus.*

But of the law *Julia-Titia* there is no certain account. *Vinny* ſpeaks thus of it: *unica hæc lex fuit, ut lex* Julia *et* Papia, *ſed quando, aut a quibus lata ſit, parum conſtat.*

Si ſpes ſit futuri tutoris teſtamentarii.

§ I. Sed etſi in teſtamento tutor ſub conditione, aut ex die certo datus fuerat, quamdiu conditio aut dies pendebat, ex iiſdem legibus tutor alius interim dari poterat. Item ſi pure datus fuerat, quamdiu ex teſtamento nemo hæres exiſtebat, tamdiu ex iiſdem legibus tutor petendus erat, qui deſinebat eſſe tutor, ſi conditio extiterat, aut dies venerat, aut hæres extiterat.

§ 1. *If a tutor had been given by teſtament conditionally, or from a certain day, another tutor might have been aſſigned by virtue of the above named laws, whileſt the condition depended, or 'till the day came. Alſo if a tutor had been given ſimply,* i. e. *upon no condition, yet as long as the teſtamentary heir deferred taking upon him the inheritance, another tutor might have been appointed during the interval. But the office of ſuch tutor ceaſed, when the cauſe ceaſed, for which he was appointed; as when the event of the condition happened, the day came, or the inheritance was entered upon.*

Sed

Sed ſi in teſtamento.] With us alſo guardians may be appointed either *from* a certain time, or *conditionally:* and, in either of theſe caſes, the guardianſhip is committed, and the committèe adminiſters, 'till the term, for which he was aſſigned, is expired, or 'till the condition is fulfilled. *Swin.* 215.

Si tutor ab hoſtibus ſit captus.

§ II. Ab hoſtibus quoque tutore capto, ex his legibus tutor petebatur; qui deſinebat eſſe tutor, ſi is, qui captus erat, in civitatem reverſus fuerat. Nam reverſus recipiebat tutelam jure poſtliminii.

§ 2. *By the* Attilian *and* Julio-titian *laws, if a tutor was taken by the enemy, another tutor was immediately requeſted, whoſe office ceaſed of courſe, when the firſt tutor returned from captivity; for he then reſumed the tutelage by his right of return.*

Quando et cur deſierint ex dictis legibus tutores dari.

§ III. Sed ex his legibus tutores pupillis deſierunt dari, poſteaquam primo conſules pupillis utriuſque ſexus tutores ex inquiſitione dare cœperunt, deinde prætores ex conſtitutionibus. Nam ſupradictis legibus neque de cautione à tutoribus exigenda, rem pupillis ſalvam fore, neque de compellendis tutoribus ad tutelæ adminiſtrationem, quicquam cavebatur.

§ 3. *The* Attilian *and* Julio-titian *laws, concerning the appointment of tutors, were firſt diſuſed, when the conſuls began to give tutors to pupils of either ſex with inquiſition; and the prætors were afterwards inveſted with the ſame authority by the imperial conſtitutions. For, by the above mentioned laws, no caution was required from the tutors for the ſecurity of their pupils, neither were theſe tutors compelled to act.*

Jus novum.

§ IV. Sed hoc jure utimur, ut Romæ quidem præfectus urbi, vel prætor ſecundum ſuam juriſdictionem, in provinciis autem præſides ex inquiſitione tutores crearent, vel magiſtratus juſſu præſidum, ſi non ſint magnæ pupilli facultates.

§ 4. *But, by the later uſage, at* Rome *the præfect of the city, or the prætor according to his juriſdiction, and, in the provinces, the governors [each in his reſpective province] may aſſign tutors, after an inquiry into their morals and circumſtances: and an inferior magiſtrate, at the command of a governor, may alſo appoint tutors, if the poſſeſſions of the pupil are not large.*

Sed hoc jure.] In *England*, if a minor has no tutor, and is poſſeſſed only of goods and chattels, then the ordinary may commit the tuition of ſuch minor to the next of kin, who demands it. 2 *Lev.* 162. 217. *Swin. Part.* 3. *Sec.* 9. But, according to the uſage of court chriſtian, if the child is paſt ſeven years of age, it muſt be at his own requeſt and nomination, that the judge appoints him a tutor; but, if the child is under the age of ſeven years, then the ordinary may proceed *ex officio.* Strahan.

And, in the court of chancery, a guardian can not be otherwiſe appointed, than by bringing the infant into court, or his praying a commiſſion to have a guardian aſſigned him. *Abr. of Caſes in Eq.* 260.

Jus noviſſimum.

§ V. Nos autem, per conſtitutionem noſtram hujuſmodi difficultates hominum reſecantes, nec expectata juſſione præſidum, diſpoſuimus, ſi facultates

cultates pupilli vel adulti uſque ad quingentos ſolidos valeant, defenſores civitatum una cum ejuſdem civitatis religioſiſſimo antiſtite, vel alias perſonas publicas, id eſt, magiſtratus, vel juridicum Alexandrinæ civitatis, tutores vel curatores creare: legitima cautela ſecundum ejuſdem conſtitutionis normam præſtanda, videlicet eorum periculo, qui eam accipiunt.

§ 5. *But we, for the eaſe of our ſubjects, have ordained by our conſtitution, that the judge of* Alexandria *and the magiſtrates of every city, together with the chief eccleſiaſtic, may give tutors or curators to pupils or adults, whoſe fortunes do not exceed five hundred* aurei, *without waiting for the command of the governor, to whoſe province they belong. But all ſuch magiſtrates muſt, at their peril, take from every tutor, ſo appointed, the caution required by our conſtitution.*

Nos autem per conſtitutionem.] *Cod.* 1. *t.* 4. *l.* 30. De epiſcopali audientia.

Ratio tutelæ.

§ VI. Impuberes autem in tutela eſſe, naturali juri conveniens eſt; ut is, qui perfectæ ætatis non ſit, alterius tutela regatur.

§ 6. *It is agreeable to the law of nature, that all ſuch, who are not arrived at puberty, ſhould be put under tutelage, to the intent that all, who are not adults, may be under the government of proper perſons.*

De tutelæ ratione reddenda.

§ VII. Cum ergo pupillorum pupillarumque tutores negotia gerant, poſt pubertatem tutelæ judicio rationem reddunt.

§ 7. *Tutors therefore, ſince they have the adminiſtration of the affairs of their pupils, may be compelled to render an account, by an action of tutelage, when their pupils arrive at puberty.*

Cum ergo.] By the civil law an action of tutelage can not be inſtituted, 'till the tutelage is expired. *Niſi finita tutela ſit, tutelæ agi non poteſt.* ff. 27. t. 3. *l.* 4. *De tut. et rat. diſtrah.* &c. But in *England* an infant may, by *prochein amy*, oblige his guardian to account. 1 *Ver.* 342.

TITULUS VIGESIMUS-PRIMUS.

De auctoritate tutorum.

D. xxvi. T. 8. C. v. T. 59.

In quibus cauſis auctoritas ſit neceſſaria.

AUCTORITAS autem tutoris in quibuſdam cauſis neceſſaria pupillis eſt, in quibuſdam non eſt neceſſaria: ut ecce, ſi quid dare ſibi ſtipulentur, non eſt neceſſaria tutoris auctoritas; quod ſi aliis promittant pupilli, neceſſaria eſt tutoris auctoritas. Namque placuit, meliorem quidem con-

conditionem licere iis facere etiam ſine tutoris auctoritate: deteriorem vero non aliter, quam cum tutoris auctoritate. Unde in his cauſis, ex quibus obligationes mutuæ naſcuntur, ut in emptionibus, venditionibus, locationibus, conductionibus, mandatis, depoſitis, ſi tutoris auctoritas non interveniat, ipſi quidem, qui cum his contrahunt, obligantur: at invicem pupilli non obligantur.

The authority or confirmation of a tutor is in ſome caſes neceſſary, and in others not neceſſary. When a man ſtipulates to make a gift to a pupil, the authority of the tutor is not requiſite; but, if a pupil enters into a contract, there is a neceſſity for the tutor's authority; for it is an eſtabliſhed rule, that pupils may better their condition, but not impair it, without the authority of their tutors. And therefore in all caſes, where there are mutual obligations, as in buying, ſelling, letting, hiring, mandates, depoſites, &c. he, who contracts with a pupil, is bound by the contract, but the pupil is not bound, unleſs the tutor hath authorized it.

In quibuſdam neceſſaria, in quibuſdam non neceſſaria.] A minor, by the laws of *England*, may bind himſelf without the authority of a guardian, either by bond or promiſe, to pay for thoſe things, which are ſuitable to his degree, and neceſſary.

Namque placuit.] In *England*, if the act of the guardian is prejudicial to the minor, it is in moſt caſes voidable, and when it is not voidable, the guardian may be obliged to indemnify his pupil. Thus, if an infant appears by guardian, and ſuffers a recovery, the recovery is not voidable, but the guardian is anſwerable, if his pupil ſuſtains damage. Alſo if a guardian faintpleads, or miſpleads in an action, to the injury of his pupil, the pupil will be bound; but he may afterwards have an action againſt his guardian. 1 *mod.* 48, 49.

Unde in his cauſis.] The ſame law obtains alſo in *England*: thus a leaſe, made to an infant, is not void of itſelf, but voidable only at his election. 2 *Cro.* 320.

Exceptio.

§ I. Neque tamen hæreditatem adire, neque bonorum poſſeſſionem petere, neque hæreditatem ex fidei-commiſſo ſuſcipere, aliter poſſunt, niſi tutoris actoritate, (quamvis illis lucroſa ſit) ne ullum damnum habeant.

§ 1. *But no pupil, without the authority of his tutor, can enter upon an inheritance, or take upon him the poſſeſſion of goods, or an inheritance in truſt; for, altho' there may be a probability of profit, there is a poſſibility of damage.*

Quomodo auctoritas interponi debet.

§ II. Tutor autem ſtatim in ipſo negotio præſens debet auctor fieri, ſi hoc pupillo prodeſſe exiſtimaverit. Poſt tempus vero, vel per epiſtolam, aut per nuntium, interpoſita auctoritas nihil agit.

§ 2. *If a tutor would authoriſe any act, which he eſteems advantageous to his pupil, ſuch tutor ought to be preſent at the negotiation. For the authority of a tutor can have no effect, when given by letter, by meſſenger, or after a contract is finiſhed.*

Quo caſu interponi non poteſt.

§ III. Si inter tutorem pupillumque judicio agendum ſit; quia ipſe tutor in rem ſuam auctor eſſe non poteſt, non prætorius tutor (ut olim) conſtituitur, ſed curator in locum ejus datur, quo curatore interveniente, judicium peragitur; et, eo peracto, curator eſſe deſinit.

§ 3. *When a ſuit is to be commenced between a tutor and his pupil, inaſmuch as the tutor can not exerciſe his authority, as ſuch, againſt himſelf, a curator, and not a prætorian tutor, (as it was formerly the cuſtom) is appointed, by whoſe intervention the ſuit is carried on; and, when it is determined, the curatorſhip ceaſes.*

Si inter tutorem.] In *England*, according to the preſent practice, the *prochein amy*, or next friend of the minor, ſupplies the place of the *curator*, mentioned in the text. For *prochein amy* was firſt appointed by *W.* 1. *cap.* 47. in caſe of neceſſity, where the infant was to ſue his guardian, or where the guardian would not ſue for him. 2 *Cro.* 640.

TITULUS VIGESIMUS-SECUNDUS.

Quibus modis tutela finitur.

C. v. T. 60.

De pubertate.

PUPILLI, pupillæque, cum puberes eſſe cœperint, à tutela liberantur. Pubertatem autem veteres quidem non ſolum ex annis, ſed etiam ex habitu corporis, in maſculis æſtimari volebant. Noſtra autem majeſtas, dignum eſſe caſtitate noſtrorum temporum exiſtimans, bene putavit, quod in fœminis etiam antiquis impudicum eſſe viſum eſt, id eſt, inſpectionem habitudinis corporis, hoc etiam in maſculos extendere. Et ideo, noſtra ſancta conſtitutione promulgata, pubertatem in maſculis poſt decimum quartum annum completum illico initium accipere diſpoſuimus: antiquitatis normam in fœminis bene poſitam in ſuo ordine relinquentes, ut poſt duodecim annos completos viri potentes eſſe credantur.

Pupils, both male and female, are freed from tutelage, when they arrive at puberty. The antients judged of puberty in males, not by years only, but alſo by the habit of their bodies. But our imperial majeſty, regarding the purity of the preſent times, hath eſteemed the inſpection of males to be an immodeſt practice, and hath thought it proper, that the ſame decency, which was ever obſerved in reſpect to females, ſhould be alſo obſerved in reſpect to males. And therefore, by our ſacred conſtitution, we have enacted, that puberty in males ſhould be reputed to commence immediately after the completion of their fourteenth year. But, in relation to females, we leave that wholeſom and antient rule of law unaltered, by which they are eſteemed marriageable after the twelfth year of their age is completed.

Et ideo noſtra ſancta conſtitutione.] *vid. Cod.* 5. *t.* 60. *l. ult. Quando tutores vel curatores eſſe deſinant.* "Indecoram obſervationem in exa- "minanda marium pubertate reſecantes, &c.

De capitis diminutione pupilli.

§ I. Item finitur tutela, ſi arrogati ſint adhuc impuberes, vel deportati: item ſi in ſervitutem pupillus redigatur, vel ſi ab hoſtibus captus fuerit.

§ 1. *Tutelage is determined before puberty, if the pupil is either arrogated or ſuffers deportation; and it alſo determines, if he is reduced to ſlavery, or becomes a captive.*

Ab hoſtibus captus.] Quia nemo in tutela eſſe poteſt, niſi qui ſit ſui juris. *ff.* 26. *t.* 1. *l.* 14.

De conditionis eventu.

§ II. Sed, etſi uſque ad certam conditionem datus ſit tutor teſtamento, æque evenit, ut deſinat eſſe tutor exiſtente conditione.

§ 2. *But, if a teſtamentary tutor is given upon a certain condition, after that condition is fulfilled, the tutelage ceaſes.*

De morte.

§ III. Simili modo finitur tutela morte pupillorum vel tutorum.

§ 3. *Tutelage is alſo determined either by the death of the tutor, or by the death of the pupil.*

De capitis diminutione.

§ IV. Sed et capitis diminutione tutoris, per quam libertas vel civitas amittitur, omnis tutela perit. Minima autem capitis diminutione tutoris, veluti ſi ſe arrogandum dederit, legitima tantum perit: cæteræ non pereunt. Sed pupilli et pupillæ capitis diminutio, licet minima ſit, omnes tutelas tollit.

§ 4. *When a tutor ſuffers the greater diminution of ſtate, by which he at once loſes his liberty and the privileges of a citizen, every kind of tutelage is then extinguiſhed. But, if the leaſt diminution is only ſuffered, as when a tutor gives himſelf in arrogation, then no ſpecies of tutelage is extinguiſhed, except the legitime. But every diminution of ſtate in pupils takes away all tutelage.*

De tempore.

§ V. Præterea, qui ad certum tempus teſtamento dantur tutores, finito eo, deponunt tutelam.

§ 5. *Thoſe, who are by teſtament made tutors for a term only, are, at the expiration of ſuch term, diſcharged from the tutelage.*

De remotione et excuſatione.

§ VI. Deſinunt etiam tutores eſſe, qui vel removentur à tutela ob id, quod ſuſpecti viſi ſunt; vel qui ex juſta cauſa ſe excuſant, et onus adminiſtrandæ tutelæ deponunt, ſecundum ea, quæ inferius proponemus.

§ 6. *They alſo ceaſe to be tutors, who are either removed from their office upon ſuſpicion, or excuſe and exempt themſelves from the burden of tutelage for juſt reaſons, of which we ſhall treat hereafter.*

TITULUS VIGESIMUS-TERTIUS.

De curatoribus.

D. xxvii. T. 10. C. v. T. 70.

De adultis.

MASCULI quidem puberes, et fœminæ viri potentes, uſque ad viceſimum quintum annum completum curatores accipiunt; quia licet puberes ſint, adhuc tamen ejus ætatis ſunt, ut ſua negotia tueri non poſſint.

Males arrived at puberty, and females marriageable, do nevertheleſs receive curators, 'till they have compleated their twenty-fifth year: for, altho' they have attained to puberty, they are not as yet of an age to take a proper care of their own affairs.

Maſculi quidem puberes.] By the civil law, males at the age of twenty years complete, and females at eighteen, having given a ſufficient proof, by five or more witneſſes, of their prudence and morality, may obtain a licence from the emperor, inabling them to adminiſter their own affairs under proper reſtrictions. For minors are not permitted by this licence to alien, or even to mortgage their immoveable poſſeſſions, but muſt always obtain a ſpecial decree for ſuch purpoſes. *Cod. 2. t. 45. l. 1, 2, 3. de his qui ven. æt. impetraverunt.*

A quibus dentur curatores.

§ I. Dantur autem curatores ab eiſdem magiſtratibus, à quibus et tutores. Sed curator teſtamento non datur; datus tamen confirmatur decreto prætoris vel præſidis.

§ 1. *Curators are appointed by the ſame magiſtrates, who appoint tutors. A curator can not be abſolutely given by teſtament, but a tutor, named in a teſtament, may be confirmed ſuch, either by a prætor or the governor of a province.*

Teſtamento non datur.] A curator can not be given by teſtament; becauſe a curator, by virtue of his office, has the care of the minor's eſtate: and a father can not diſpoſe of the goods of his ſon, who is arrived at puberty; for at that age he hath a right to make a will. ff. 28. *t.* 6. *l.* 2. But the magiſtrates generally appoint him to be curator, whom the father hath recommended, tho' not always. ff. 26. *t.* 1. *l.* 39. § 1.

Quibus dentur.

§ II. Item inviti adoleſcentes curatores non accipiunt, præterquam in litem; curator enim et ad certam cauſam dari poteſt.

§ 2. *No adults can be obliged to receive curators, unleſs* ad litem; *for a curator may be appointed to any ſpecial purpoſe, or to the management of any particular affair.*

Item inviti adoleſcentes.] *Rævardus* and others have accuſed *Tribonian*, as guilty of an error, in ſaying, that minors, after fourteen, could not be obliged to receive curators.—— And, in ſupport of their accuſation, they allege the opinion of *Ulpian*, whoſe words are theſe.—— *Hodie in hanc uſque ætatem adoleſcentes curatorum auxilio reguntur, nec ante rei ſuæ adminiſtratio eis committi debebit, quamvis bene rem ſuam gerentibus.* ff. 4. t. 4. *l.* 1.—— But it muſt be obſerved, that, with

with regard to minors after puberty, the *Roman* law has freqently been altered. By the law *Lætoria, ann. urb. con.* 550. ſuch minors only, who behaved ill, were obliged to receive curators after proof had been made of their ill behavior. But afterwards it was enacted, by a conſtitution of *Marcus Antoninus*, *Ut omnes adulti curatores acciperent, non redditis cauſis :* which muſt mean, that adults might be *obliged* to receive curators, altho' nothing could be alleged againſt their conduct : for it is certain, that adults might voluntarily receive curators, even before the law *Lætoria*. And, when *Ulpian* wrote, the conſtitution of *Marcus Antoninus* was as yet unrepealed; but afterwards, in the latter part of the reign of *Antoninus Caracalla*, it appears from *Cod.* 5. *t.* 31. *l.* 1. that the *Roman* law was again altered, and that curators could not be given, but to ſuch minors as were willing to receive them, unleſs *ad litem*.

And, in this, the law of *England* may be ſaid to agree in general with the civil law : for, with us, guardianſhip regularly determines, when the minor has completed his fourteenth year; except, when there is a guardian by nature, or when the father of a minor has ſpecially appointed a guardian either by deed, or will, to continue for a longer time. And therefore a minor, after fourteen, being of courſe freed from cuſtody, is at liberty, if willing, to put himſelf a ſecond time under guardianſhip, until he is of full age. But, if a minor, being an adult, does not conſent to receive a new guardian, then no court would appoint a guardian, unleſs *ad litem*.

But, if a teſtator nominates a guardian, 'till his ſon arrives at full age, then the ſon, altho' above fourteen, is compelled to receive the guardian, who is thus expreſsly appointed for a certain time; but if no certain time is mentioned, there is then no guardianſhip, if the minor is an adult. *Vaugh.* 185.

De furioſis et prodigis.

§ III. Furioſi quoque, et prodigi, licet majores viginti quinque annis ſint, tamen in curatione ſunt agnatorum, ex lege duodecim tabularum. Sed ſolent Romæ præfectus urbi vel prætores, et in provinciis præſides, ex inquiſitione eis curatores dare.

§ 3. *By a law of the twelve tables, all madmen and prodigals, altho' of full age, muſt nevertheleſs be under the curation of their* agnati. *But, if there are no* agnati, *or if ſuch, who do exiſt, are unqualified, then curators are appointed; at* Rome, *by the præfect of the city, or the prætor; and in the* provinces, *by the governors, after the requiſite inquiry.*

Sed ſolent.] The text in this place is undoubtedly deficient, and *Theophilus*, whoſe authority is followed in the *Engliſh*, has thus ſupplied, what ſeems to have been omitted.

Ἡνικα μη ὑπες ι ἀδυλος, ἡ ὑπων, ἀνεπιτηδειος ἐς ι προς διοικησιν. h. t.

De mente captis, ſurdis, &c.

§ IV. Sed et mente captis, et ſurdis, et mutis, et illis, qui perpetuo morbo laborant, (quia rebus ſuis ſupereſſe non poſſunt) curatores dandi ſunt.

§ 4. *Thoſe, who are deprived of their intellects, or deaf, or mute, or ſubject to any continual diſorder, inaſmuch as they are unable to take a proper care of their own affairs, muſt be placed under curators.*

Sed et mente captis.] With us all perſons *non mentis compotes* are reputed to labor under either idiocy or lunacy; and the king, by law, is their general guardian. Idiocy is a fatuity, or madneſs, *a nativitate*; and this excuſes the party, as to his acts, but intitules the king, during the life of the idiot, to the profits of his eſtate, both real and perſonal, without rendering an account.

Lunacy is an adventitious madneſs or fatuity, either *permanent*, or with *intervals*, and equally excuſeth with idiocy, as to all acts done, during the phrenzy. But the king, in caſe of lunacy, acts as a guardian and truſtee for the lunatic, and is therefore accountable to him, if he regains his underſtanding, or to his repreſentatives, if it happens otherwiſe. 4 *Co. rep.* 125. *Bacon's abr.* 80. *vol.* 3.

De

De pupillis.

§ V. Interdum autem et pupilli curatores accipiunt; ut puta, ſi legitimus tutor non ſit idoneus: quoniam habenti tutorem tutor dari non poteſt. Item, ſi teſtamento datus tutor, vel à prætore aut præſide, idoneus non ſit ad adminiſtrationem, nec tamen fraudulenter negotia adminiſtret, ſolet ei curator adjungi. Item loco tutorum, qui non in perpetuum, ſed ad tempus à tutela excuſantur, ſolent curatores dari.

§ 5. *Sometimes even pupils receive curators; for inſtance, when the legal tutor is unqualified: for a tutor muſt not be given to him, who already has a tutor. Alſo, if a teſtamentary tutor, or a tutor given by a* prætor *or the governor of a province, appears to be afterwards incapable of executing his truſt, it is uſual, altho' he is guilty of no fraud, to appoint a curator to be joined with him. It is alſo uſual to aſſign curators in the place of ſuch tutors, who are not wholly excuſed, but excuſed for a time only.*

De conſtituendo actore.

§ VI. Quod ſi tutor vel adverſa valetudine, vel alia neceſſitate, impediatur, quo minus negotia pupilli adminiſtrare poſſit, et pupillus vel abſit, vel infans ſit, quem velit actorem, periculo ipſius tutoris, prætor, vel qui provinciæ præerit, decreto conſtituet.

§ 6. *If a tutor, by illneſs or any other neceſſary impediment, ſhould be hindered from the perſonal execution of his office, and his pupil ſhould be abſent, or an infant, then the prætor or the governor of the province ſhall decree any perſon, whom the tutor approves of, to be the pupil's agent, for whoſe conduct the tutor muſt be anſwerable.*

TITULUS VIGESIMUS-QUARTUS.

De ſatiſdatione tutorum, vel curatorum.

D. xxvii. T. 7. C. v. T. 57.

Qui ſatiſdare cogantur.

NE tamen pupillorum, pupillarumve, et eorum, qui quæve in curatione ſunt, negotia à curatoribus tutoribuſve conſumantur vel diminuantur, curet prætor, ut et tutores et curatores eo nomine ſatiſdent. Sed hoc non eſt perpetuum; nam tutores teſtamento dati ſatiſdare non coguntur: quia fides eorum et diligentia ab ipſo teſtatore approbata eſt. Item ex inquiſitione tutores vel curatores dati ſatiſdatione non onerantur, quia idonei electi ſunt.

It is a branch of the prætor's office to ſee, that tutors and curators give a ſufficient caution for the ſafety and indemnification of their pupils. But this is not always neceſ-

neceſſary; for a teſtamentary tutor is not compelled to give caution, inaſmuch as his fidelity and diligence ſeem ſufficiently approved of by the teſtator. Alſo all tutors, and curators, appointed to be ſuch, after inquiry, are ſuppoſed in every reſpect to be qualified, and are therefore not obliged to give ſecurity.

Quatenus ſatiſdatio in iis, qui ſatiſdare non compelluntur, locum habere poſſit.

§ I. Sed, ſi ex teſtamento vel inquiſitione duo pluresve dati fuerint, poteſt unus offerre ſatiſdationem de indemnitate pupilli vel adoleſcentis, et contutori ſuo vel concuratori præferri, ut ſolus adminiſtret; vel ut contutor aut concurator ſatis offerens præponatur ei, ut et ipſe ſolus adminiſtret. Itaque per ſe non poteſt petere ſatiſdationem à contutore vel concuratore; ſed offerre debet, ut electionem det concuratori vel concuratori ſuo, utrum velit ſatis accipere, an ſatiſdare. Quod ſi nemo eorum ſatis offerat, ſiquidem adſcriptum fuerit à teſtatore, quis gerat, ille gerere debet; quod ſi non fuerit adſcriptum, quem major pars elegerit, ipſe gerere debet, ut edicto prætoris cavetur. Sin autem ipſi tutores diſſenſerint circa eligendum eum vel eos, qui gerere debent, prætor partes ſuas interponere debet. Idem et in pluribus ex inquiſitione datis comprobandum eſt, id eſt, ut major pars eligere poſſit, per quem adminiſtratio fiat.

§ 1. *If two, or more, are appointed by teſtament or by a magiſtrate, after inquiry, to be tutors or curators, any one of them, by offering caution, may be preferred to the ſole adminiſtration, or cauſe his co-tutor, or co-curator, to give caution, in order to be admitted himſelf to the adminiſtration. Thus it appears, that a man can not demand ſecurity from his co-tutor or co-curator; but that, by offering caution himſelf, he may compel his co-tutor, or co-curator, to give or receive caution. But, when no ſecurity is offered, if the teſtator hath appointed any particular perſon to act, ſuch perſon muſt be preferred; but, if no particular perſon is ſpecified by the teſtator, then muſt the adminiſtration be committed to ſuch perſon or perſons, whom a majority of the tutors ſhall elect, according to the prætorian edict: but, if they diſagree in their choice, the prætor may interpoſe his authority. The ſame rule is alſo to be obſerved, when many, either tutors or curators, are nominated by the magiſtrate,* viz. *that a majority of them may appoint one of their number, to whom the adminiſtration ſhall be committed.*

Edicto prætoris.] Not extant.

Qui ex adminiſtratione tutelæ vel curationis tenentur.

§ II. Sciendum autem eſt, non ſolum tutores vel curatores pupillis vel adultis, cæteriſque perſonis, ex adminiſtratione rerum teneri: ſed etiam in eos, qui ſatiſdationem accipiunt, ſubſidiariam actionem eſſe, quæ ultimum eis præſidium poſſit afferre. Subſidiaria autem actio in eos datur, qui aut omnino a tutoribus vel curatoribus ſatiſdari non curaverunt, aut non idoneè paſſi ſunt caveri. Quæ quidem tam a prudentum reſponſis, quam ex conſtitutionibus imperialibus, etiam in hæredes eorum extenditur.

§ 2.

§ 2. *It is neceſſary to be known, that tutors and curators are not the only perſons ſubject to an action, on account of the adminiſtration of the affairs of pupils, minors, and others under their protection. For a ſubſidiary action, which is the laſt remedy to be uſed, will alſo lie againſt a magiſtrate, either for intirely omitting to take ſureties, or for taking ſuch, who are inſufficient. And this action, according to the anſwers of the lawyers as well as by the imperial conſtitutions, is extended even againſt the heir of any ſuch magiſtrate.*

Sciendum.] Various remedies are given to pupils and minors, who have received any damage by the male-adminiſtration or negligence of their tutors or curators.

The perſonal actions, to which minors are intituled, againſt their tutors or curators, are called *Actiones tutelæ* and *negotiorum geſtorum utiles.*—*Quicquid tutoris dolo vel lata culpa aut levi, ſeu curatoris, minores amiſerint, vel, cum poſſent, non acquiſierint: hoc in tutelæ ceu negotiorum geſtorum utile judicium venire, non eſt incerti juris.* Cod. 5. t. 51. *l.* 7.

And the heirs of tutors and curators are alſo liable to the ſame actions *ob dolum et latam culpam.* Cod. 2. t. 19. *l.* 17.

Pupils or minors may alſo ſue the ſureties of their tutors or curators, by an action ariſing from the ſtipulation entered into by ſuch ſureties. *D.* 27. *t.* 7. *ll.* 3, 5. *Cod.* 5. *t.* 57. *ll.* 1, 2.

And laſtly, as their dernier reſſort, minors have a right to an action called *ſubſidiary*, againſt any magiſtrate, who hath neglected to do his duty, either by taking no ſecurity, or what was not ſufficient. *D.* 27. *t.* 8. *l.* 1. §. 6.

But the heirs of tutors, curators, ſureties and magiſtrates, are only ſuable in caſes of fraud in themſelves, or in thoſe, to whom they are heirs; but not merely on account of negligence. *D.* 27. *t.* 7. *l.* 4. *C.* 5. *t.* 75. *l.* 2. *Claude Ferriere, h. t.*

Conſtitutionibus.] *Cod.* 5. *t.* 43. *l.* 3.

Si tutor vel curator cavere nolit.

§ III. Quibus conſtitutionibus et illud exprimitur, ut, niſi caveant tutores et curatores, pignoribus captis coerceantur.

§ 3. *And by the ſame conſtitutions it is expreſsly enacted, that all tutors and curators, who refuſe to give caution, may be compelled to it.*

Qui dicta actione non tenentur.

§ IV. Neque autem præfectus urbi, neque prætor, neque præſes provinciæ, neque quiſquam alius, cui tutores dandi jus eſt, hac actione tenebitur: ſed hi tantummodo, qui ſatiſdationem exigere ſolent.

§ 4. *Neither the præfect of the city, nor the prætor, nor the governor of a province, nor any other, who has power to aſſign tutors, ſhall be ſubject to a ſubſidiary action: but thoſe magiſtrates only are liable to it, who exact the caution.*

Exigere ſolent.] The exaction of caution was the buſineſs of the inferior magiſtrates; of the *ſcribes* at Rome, and of the *duumviri* in the provinces. *Cod.* 5. *t.* 75. *l. ult.* *D.* 27. *t.* 8. *l.* 1. *D.* 15. *t.* 1. *l.* 1.

TITU-

TITULUS VIGESIMUS-QUINTUS.

De excuſationibus tutorum vel curatorum.

D. xxvii. T. 1. C. v. T. 62.

De numero liberorum.

EXCUSANTUR autem tutores et curatores variis ex cauſis; plerumque tamen propter liberos, ſive in poteſtate ſint, ſive emancipati. Si enim tres liberos ſuperſtites Romæ quis habeat, vel in Italia quatuor, vel in provinciis quinque, à tutela vel cura poteſt excuſari, exemplo cæterorum munerum; nam et tutelam et curam placuit publicum munus eſſe. Sed adoptivi liberi non proſunt; in adoptionem autem dati naturali patri proſunt. Item nepotes ex filio proſunt, ut in locum patris ſui ſuccedant; ex filia non proſunt. Filii autem ſuperſtites tantum ad tutelæ vel curæ muneris excuſationem proſunt: defuncti autem non proſunt. Sed, ſi in bello amiſſi ſunt, quæſitum eſt, an proſint? Et conſtat, eos ſolos prodeſſe, qui in acie amittuntur. Hi enim, qui pro republica ceciderunt, in perpetuum per gloriam vivere intelliguntur.

Perſons, who are nominated to be either tutors or curators, may, upon diverſe accounts, excuſe themſelves; but the moſt general plea offered is that of having children, whether they are ſubject, or emancipated. For at Rome, *if a man has three children living, in* Italy *four, and in the* provinces *five, he may therefore be excuſed from tutelage and curation, as well as from other employments of a public nature; for both tutelage and curation are eſteemed public offices. But adopted children will not avail the adoptor; they will nevertheleſs excuſe their natural father, who gave them in adoption. Alſo grand-children by a ſon, when they ſucceed in the place of their father, will excuſe their grand-father; yet grand-children by a daughter will not excuſe him. But thoſe children only, who are* living, *can excuſe from tutelage and curation: for the deceaſed are of no ſervice. And ſhould it now be demanded, whether a parent can avail himſelf of thoſe ſons, whom war has deſtroyed? It muſt be anſwered,—— that he can avail himſelf of thoſe only, who have periſhed in battle: for thoſe, who have fallen for the republic, are eſteemed to live for ever, in the immortality of their fame.*

Excuſantur autem.] The laws of *England* are ſilent concerning the excuſes of guardians, becauſe no man can be compelled to take the office of guardianſhip. *De excuſatione tutorum vel curatorum, leges noſtræ nihil loquuntur, quia nemini invito hoc munus imponunt.* Cow. Inſt. t. 25.

Qui in acie amittuntur.] *Acies* is here oppoſed to *bellum*, in conformity to the following opinion of *Ulpian*.—— *Bello amiſſi ad tutelæ excuſationem proſunt.— Quæſitum eſt autem, qui ſint iſti: utrum hi, qui in acie ſint interempti; an vero omnes omnino, qui per cauſam belli parentibus ſunt abrepti, in obſidione forte? Melius igitur probabitur, eos ſolos, qui in acie amittuntur, prodeſſe debere, cujuſcunque ſexus, vel ætatis ſint: hi enim pro republica ceciderunt.* ff. 27. t. 1. l. 18. de excuſationibus.

De adminiſtratione rei fiſcalis.

§ I. Item divus Marcus in ſemeſtribus reſcripſit, eum, qui res fiſci adminiſtrat, à tutela et cura, quamdiu adminiſtrat, excuſari poſſe.

§ 1. *The emperor* Marcus *declared by reſcript from his* Semeſtrial *council, that whoever is ingaged in the adminiſtration of affairs relating to the treaſury, may be excuſed from tutelage and curation, whileſt he is ſo imployed.*

In Semeſtribus.] The *Semeſtre concilium* was a privy council, compoſed of a certain number of ſenators, who were choſen by lot, and were changed every ſix months. This council was firſt appointed by *Auguſtus Cæſar*, that he might diminiſh the power of the ſenate and increaſe his own. *Sibique inſtituit conſilia ſortiri ſemeſtria, cum quibus de negotiis ad frequentem ſenatum referendis ante tractaret.* Suet. in Aug. c. 35. Dion. lib. 53. ff. 27. t. 1. *l.* 41. Cod. 5. t. 62. *ll.* 10, 25.

De abſentia reipublicæ cauſa.

§ II. Item, qui reipublicæ cauſa abſunt, à tutela vel cura excuſantur. Sed et, ſi fuerint tutores vel curatores dati, deinde reipublicæ cauſa abeſſe cœperint, à tutela vel cura excuſantur, quatenus reipublicæ cauſa abſunt: et interea curator loco eorum datur; qui, ſi reverſi fuerint, recipiunt onus tutelæ: nam nec anni habent vacationem, ut Papinianus libro quinto reſponſorum ſcripſit: nam hoc ſpatium habent ad novas tutelas vocati.

§ 2. *Thoſe, who are abſent on the affairs of the republic, are exempted from tutelage and curation. And if ſuch, who are already aſſigned to be either tutors or curators, ſhould afterwards be abſent on the buſineſs of the republic, their abſence is diſpenſed with, whileſt they continue in the public ſervice; and curators muſt be appointed in their place; but, when ſuch tutors return, they muſt again take upon them the burden of tutelage. And they are not intituled (as* Papinian *aſſerts in the fifth book of his anſwers) to the privilege of a year's vacation: for that term is allowed to thoſe only, who are called, at their return, to a new tutelage.*

De poteſtate.

§ III. Et, qui poteſtatem aliquam habent, ſe excuſare poſſunt, ut divus Marcus reſcripſit: ſed ſuſceptam tutelam deſerere non poſſunt.

§ 3. *By a reſcript of the emperor* Marcus, *all ſuperior magiſtrates may, as ſuch, excuſe themſelves. But they can not deſert a tutelage, when once they have undertaken it.*

Qui poteſtatem.] "Non nunquam, κατ' "ἐξοχην, ſoli magiſtratus majores imperium et "poteſtatem habere dicuntur, minores ſine im- "perio et poteſtate eſſe: atque in excellentiori "hoc ſignificatu verbum *poteſtatis* hic accipien- "dum eſt. *Vinn. h. l.*" "Majores eſſe dicun- "tur, qui majora habent auſpicia, viz. conſu- "les, prætores, et cenſores; minores, qui mi- "nora. Secundò majores dicuntur, qui licto- "rem et viatorem habent, quos nec ædiles, nec "quæſtores habuerunt." *Eden. elem.*

De lite cum pupillo vel adulto.

§ IV. Item propter litem, quam cum pupillo vel adulto tutor vel curator habet, excuſari non poteſt: niſi forte de omnibus bonis vel hæreditate controverſia ſit.

§ 4. *No man can excuſe himſelf from taking the office of a tutor or curator, by alleging a law-ſuit with the pupil or minor, unleſs the ſuit is for all the goods, or the whole inheritance of ſuch pupil or minor.*

Propter litem.] This law is now uſeleſs; for, by the 72d Novel of *Juſtinian*, the debtors or creditors of minors are prohibited to be their tutors or curators.

De tribus tutelæ et curæ oneribus.

§ V. Item tria onera tutelæ non affectatæ, vel curæ, præſtant vacationem, quamdiu adminiſtrantur: ut tamen plurium pupillorum tutela vel cura eorundem bonorum, veluti fratrum, pro una computetur.

§ 5. *Three tutelages or curatorſhips, which are not acquired merely for advantage, will exempt a man from the burden of a fourth. But the tutelage or curation of three or more brothers is reckoned but as one.*

De paupertate.

§ VI. Sed et propter paupertatem excuſationem tribui, tam divi fratres, quam per ſe divus Marcus reſcripſit, ſi quis imparem ſe oneri injuncto poſſit docere.

§ 6. *The divine brothers have declared by their reſcript, and the emperor* Marcus *by his ſeparate reſcript, that poverty is a ſufficient excuſe, when it can be proved to be ſuch, which muſt render a man incapable of the burden impoſed upon him.*

Divi fratres.] The emperors were called *divi* or divine, becauſe they were always conſidered, in every reſpect, as gods, after the ceremony of their *apotheoſis* had been performed. *vid. Herod. lib.* 3. As to the emperors here meant by the words *divi fratres*, the commentators are not agreed in aſcertaining, who they were; but *Vinny* ſuppoſes them to have been *Marcus Aurelius* the philoſopher, and *Ælius Verus*, the ſons of *Antoninus Pius*.

De adverſa valetudine.

§ VII. Item propter adverſam valetudinem, propter quam ne ſuis quidem negotiis intereſſe poteſt, excuſatio locum habet.

§ 7. *Illneſs alſo, if it is ſo great as to hinder a man from tranſacting his own buſineſs, is a ſufficient excuſe.*

De imperitia literarum.

§ VIII. Similiter eos, qui literas neſciunt, eſſe excuſandos, Divus Pius reſcripſit; quamvis et imperiti literarum poſſint ad adminiſtrationem negotiorum ſufficere.

§ 8. *By the reſcript of the emperor* Antoninus Pius, *illiterate perſons are to be excuſed; altho' in ſome caſes an illiterate man may not be incapable of the adminiſtration.*

De inimicitia patris.

§ IX. Item ſi propter inimicitias aliquem teſtamento tutorem pater dederit, hoc ipſum præſtat ei excuſationem; ſicut per contrarium non excuſantur, qui, ſe tutelam adminiſtraturos, patri pupillorum promiſerant.

§ 9. *If a father thro' enmity appoints any particular perſon, by teſtament, to be tutor to his children, the motive of ſuch an appointment will afford a ſufficient excuſe. But he, who by promiſe hath ingaged himſelf to a teſtator, is not to be excuſed from the office of tutelage.*

De ignorantia teſtatoris.

§ X. Non eſſe autem admittendam excuſationem ejus, qui hoc ſolo utitur, quod ignotus patri pupillorum ſit, Divi fratres reſcripſerunt.

§ 10. *The divine brothers have enacted by their reſcript, that the pretence of being unknown to the father of a pupil, is not to be admitted ſolely, as a ſufficient excuſe.*

De inimicitiis cum patre pupilli vel adulti.

§ XI. Inimicitiæ, quas quis cum patre pupillorum vel adultorum exercuit, ſi capitales fuerunt, nec reconciliatio intervenit, a tutela vel cura ſolent excuſare.

§ 11. *An enmity, againſt the father of a pupil or adult, will ſufficiently excuſe any man, either from tutelage or curatorſhip, if no reconciliation hath intervened.*

Si capitales.] By a capital enmity is underſtood ſuch an hatred, which might ariſe from a public accuſation, affecting the life, liberty, and good name of the party accuſed. *ff.* 38. *l.* 14. *ff.* 50. *l.* 103. *de verb. ſign.* But even ſuch an accuſation could not excuſe a teſtamentary tutor, inaſmuch as the appointment would imply the teſtator's forgiveneſs, unleſs it appeared, that he acted upon another motive, and intended only to lay a burden upon the perſon, whom he had nominated. *Hein. Vinn.*

De ſtatus controverſia a patre pupilli illata.

§ XII. Item is, qui ſtatus controverſiam a pupillorum patre paſſus eſt, excuſatur a tutela.

§ 12. *Alſo he, whoſe condition hath been controverted at the inſtance of the father of the pupil, is upon that account excuſed from the tutelage.*

De ætate.

§ XIII. Item major ſeptuaginta annis a tutela et cura ſe poteſt excuſare. Minores autem viginti quinque annis olim quidem excuſabantur: noſtra autem conſtitutione prohibentur ad tutelam vel curam adſpirare: adeo ut nec excuſatione opus ſit. Qua conſtitutione cavetur; ut nec pupillus ad legitimam tutelam vocetur, nec adultus: cum ſit incivile, eos, qui alieno auxilio in rebus ſuis adminiſtrandis egere noſcuntur, et ab aliis reguntur, aliorum tutelam vel curam ſubire.

§ 13. *Any perſon, who is above ſeventy years of age, may be excuſed both from tutelage and curation. Alſo minors, as ſuch, were formerly excuſable; but, by our conſtitution, they are now prohibited from aſpiring to theſe truſts; and of courſe all excuſes are become unneceſſary. It is alſo enacted by the ſame conſtitution, that neither pupils, nor adults, ſhall be called even to a legitime tutelage. For it is abſurd, that perſons, who are themſelves under governors, and known to want aſſiſtence in the adminiſtration of their own affairs, ſhould notwithſtanding this be admitted, either as tutors or curators, to have the management of the affairs of others.*

De

De militia.

§ XIV. Idem in milite obſervandum eſt, ut nec volens ad tutelæ onus admittatur.

§ 14. *And we muſt alſo obſerve, that no military perſon, altho' willing, can be admitted to become a tutor or curator.*

Idem et in milite.] *Militiæ armatæ muneribus occupatus, neque ſi legitimus ſit, neque ſi ex teſtamento datus fuerit, nec alio modo, etſi voluerit, tutor vel curator fieri poteſt; ſed, ſi errore ductus res adminiſtraverit, negotiorum geſtorum actione convenitur.* Cod. 5. t. 33. *l.* 4. Cod. 6. t. 36. *l.* 8.

De grammaticis, rhetoribus, et medicis.

§ XV. Item Romæ grammatici, rhetores, et medici, et qui in patria ſua has artes exercent, et intra numerum ſunt, à tutela et cura habent vacationem.

§ 15. *Both at* Rome *and in the* provinces, *all grammarians, teachers of rhetoric, and phyſicians, who exerciſe their profeſſions within their own country, and are within the number authorized, are exempted from tutelage and curation.*

De tempore et modo proponendi excuſationes.

§ XVI. Qui autem ſe vult excuſare, ſi plures habeat excuſationes, et de quibuſdam non probaverit, aliis uti, intra tempora conſtituta, non prohibetur. Qui autem excuſare ſe volunt, non appellant, ſed intra quinquaginta dies continuos, ex quo cognoverint ſe tutores vel curatores datos, ſe excuſare debent, cujuſcunque generis ſint, id eſt, qualitercunque dati fuerint tutores, ſi intra centeſimum lapidem ſint ab eo loco, ubi tutores dati ſunt. Si vero ultra centeſimum lapidem habitant, dinumeratione facta viginti millium diurnorum, et amplius triginta dierum; qui tamen, ut Scævola dicebat, ſic debent computari, ne minus ſint, quam quinquaginta dies.

§ 16. *He, who can allege many excuſes, and hath failed in his proof of thoſe, which he hath already given, is not prohibited from aſſigning others within the time preſcribed. But tutors and curators of whatever kind, whether legal, teſtamentary, or dative, (if they are willing to excuſe themſelves) ought not to prefer an appeal merely on account of their appointment; but they ſhould firſt exhibit their excuſes before the proper magiſtrate: and this they ought to do within fifty days after they are certified of their nomination, on ſuppoſition, that they are within an hundred miles from the place, where they were nominated. But, if they are at the diſtance of more than an hundred miles, they are allowed a day for every twenty miles, and thirty days beſides, which, taken together, ought never, according to* Scævola, *to make a leſs number of days than* 50.

Non appellant.] They ought not to appeal from the appointment, but from the ſentence, by which their excuſes are rejected. *Non a datione ſed a ſententia, qua excuſatio non fuit admiſſa: ſi quis enim tutor datus fuerit, vel teſtamento, vel a quo alio, qui jus dandi habet, non oportet eum provocare; hoc enim divus* Marcus Aurelius *effecit; ſed intra tempora præſtituta excuſationem allegandam habet, et, ſi fuerit pulſa, tunc demum appellare debebit, cæterum ante fruſtra appellatur.* ff. 49. t. 4. *l.* 1.

De excuſatione pro parte patrimonii.

§ XVII. Datus autem tutor ad univerſum patrimonium datus eſſe creditur.

§ 17. *When a tutor is appointed, he is reputed to have the care of the whole patrimony of his pupil.*

De tutelæ geſtione.

§ XVIII. Qui tutelam alicujus geſſit, invitus curator ejuſdem fieri non compellitur: in tantum, ut licet pater-familias, qui teſtamento tutorem dedit, adjecerit, ſe eundem curatorem dare, tamen invitum eum curam ſuſcipere non cogendum, divi Severus et Antoninus reſcripſerunt.

§ 18. *He, who hath been the tutor of a minor, can not be compelled to become his curator. And, by the reſcript of the emperors* Severus *and* Antoninus, *altho' the father of a family ſhould, by teſtament, appoint any perſon to be firſt the tutor of his children, and afterwards their curator, if the perſon ſo appointed is unwilling to take upon him the curation, he is by no means compellable.*

De marito.

§ XIX. Iidem reſcripſerunt, uxoris ſuæ curatorem datum excuſare ſe poſſe, licet ſe immiſceat.

§ 19. *The ſame emperors have likewiſe, by their reſcript, enacted, that an huſband may excuſe himſelf from being a curator to his wife, even after he hath begun to act.*

De falſis allegationibus.

§ XX. Si quis autem falſis allegationibus excuſationem tutelæ meruerit, non eſt liberatus onere tutelæ.

§ 20. *If any man ſhould, by falſe allegations, have appeared to merit a diſmiſſion from the office of tutelage, he is not therefore freed from the burden of this office.*

TITULUS VIGESIMUS-SEXTUS.

De ſuſpectis tutoribus vel curatoribus.

D. xxvi. T. 10. C. v. T. 43.

Unde ſuſpecti crimen deſcendat.

SCIENDUM eſt, ſuſpecti cirmen ex lege duodecim tabularum deſcendere.

The accuſation of a ſuſpected tutor, or curator, is derived from the law of the twelve tables.

Suſpecti crimen.] *Crimen* here ſignifies an accuſation, and is ſo interpreted by *Theophilus* in his paraphraſe. Ειπω μεν δε τα περι της κατηγοριας. It is alſo frequently uſed by *Tully* and the beſt commentators, in the ſame ſenſe: *tria ſunt quantum exiſtimare poſſum, quæ obſtant, hoc tempore, ſexto* Roſcio, *crimen adverſariorum, et audacia, et potentia.* Pro *Roſc. Amer.*

Qui

Qui de hoc crimine cognoſcunt.

§ I. Datum autem eſt jus removendi tutores ſuſpectos Romæ prætori, et in provinciis præſidibus earum, et legato proconſulis.

§ 1. *At* Rome *the power of removing ſuſpected tutors belongs to the prætor, and in the* provinces *to the governors, or to the* legate *of a proconſul.*

Qui ſuſpecti fieri poſſunt.

§ II. Oſtendimus, qui poſſunt de ſuſpecto cognoſcere: nunc videamus, qui ſuſpecti fieri poſſint. Et poſſunt quidem omnes tutores fieri ſuſpecti, ſive ſint teſtamentarii, ſive non ſint, ſed alterius generis tutores. Quare, etſi legitimus fuerit tutor, accuſari poterit. Quid ſi patronus? Adhuc idem erit dicendum: dummodo meminerimus, famæ patroni parcendum eſſe, licet ut ſuſpectus remotus fuerit.

§ 2. *We have already ſhewed, what magiſtrates may take cognizance of ſuſpected perſons: let us now therefore inquire, what perſons may become ſuſpected. And indeed all tutors may become ſo, whether they are teſtamentary, or of any other denomination. For even a legitime tutor may be accuſed; neither is a* patron *leſs ſubject to an accuſation; but we muſt remember, that, as ſuch, his reputation muſt be ſpared, altho' he is removed from his truſt, as a ſuſpected perſon.*

Et poſſunt quidem omnes.] Guardians at *common law* may be removed, or compelled to give ſecurity, if there appears any danger of their abuſing either the perſon, or the eſtate of the minor. *Stile* 456. *Hard.* 96. 3 *Chan. rep.* 58. 1 *Sid.* 424. 3 *Salk.* 177.

But there is no inſtance of the removal of a *ſtatute guardian*; yet terms have frequently been impoſed, ſo as effectually to prevent ſuch guardian from doing any act to the prejudice of a minor. But *quære*, whether cauſes may not ariſe, for which a ſtatute or teſtamentary guardian may totally be removed, notwithſtanding the ſtatute; as if he become mad, lunatic, *&c.* for a guardianſhip is not aſſignable, neither can it go to executors, or adminiſtrators, being a perſonal truſt. *Vaugh.* 180. *Caſes in eq. abr.* 261.

Famæ patroni parcendum.] When an action is brought againſt a ſuſpected patron or parent, it muſt be an action *in factum*, and no mention muſt be made of fraud: *ſed ex quibus cauſis actio in* alios *famoſa datur, ex iiſdem adverſus* illos *in factum datur, omiſſa doli mentione.* ff. 4. t. 3. *l.* 11. De dolo malo.

Qui poſſunt ſuſpectos poſtulare.

§ III. Conſequens eſt, ut videamus, qui poſſint ſuſpectos poſtulare. Et ſciendum eſt, quaſi publicam eſſe hanc accuſationem, hoc eſt, omnibus patere. Quinimo mulieres admittuntur ex reſcripto divorum Severi et Antonini; ſed hæ ſolæ, quæ, pietatis neceſſitudine ductæ, ad hoc procedunt: ut puta mater, nutrix quoque et avia: poteſt et ſoror. Sed et ſi qua alia mulier fuerit; quam prætor propenſa pietate intellexerit ſexus verecundiam non egredientem, ſed pietate productam, non ſuſtinere injuriam pupillorum, admittet eam ad accuſationem.

§ 3. *It now remains, as a conſequence, that we inquire, by whom ſuſpected perſons may be accuſed. It muſt therefore be known, that an accuſation of this ſort is of a public nature, and open to all. For, by a reſcript of the emperors* Severus *and* Antoninus, *even women are admitted to be accuſers; yet ſuch only, who are induced to it by their duty, or by their relation to the minor: thus a mother, a nurſe, or a grandmother, may become accuſers; and alſo a ſiſter. But the prætor can at diſcretion admit*

mit any woman, who acting with a becoming modesty, but impatient of wrongs offered to pupils, appears to have no other motive, than to relieve the injured.

An pubes vel impubes.

§ IV. Impuberes non possunt tutores suos suspectos postulare: puberes autem curatores suos ex consilio necessariorum suspectos possunt arguere: et ita Divi Severus et Antoninus rescripserunt.

§ 4. *No pupil can bring an accusation of suspicion against his tutor: but adults, by the rescript of* Severus *and* Antoninus, *are permitted, when they act by advice of persons related to them, to accuse their curators.*

Qui dicatur suspectus.

§ V. Suspectus autem est, qui non ex fide tutelam gerit, licet solvendo sit, ut Julianus quoque scripsit. Sed, et anteaquam incipiat tutelam gerere tutor, posse eum quasi suspectum removeri, idem Julianus scripsit: et secundum eum constitutum est.

§ 5. *Any tutor, who does not faithfully execute his trust, let his circumstances be ever so sufficient to answer damages, may, according to* Julian, *be pronounced suspected. And it is also the opinion of the same* Julian, *(which opinion is adhered to in our constitutions) that a tutor may be removed from his office, as suspected, even before he has begun to execute it.*

Constitutum est.] *Cod.* 5. *t.* 43. *l.* 23.

De effectu remotionis.

§ VI. Suspectus autem remotus, siquidem ob dolum, famosus est: si ob culpam, non æque.

§ 6. *When any person is removed upon* suspicion, *if it is of* fraud, *he is stigmatized with infamy; but, if of* neglect *only, he does not become infamous.*

De effectu accusationis.

§ VII. Si quis autem suspectus postulatur, quoad cognitio finiatur, interdicitur ei administratio, ut Papiniano visum est.

§ 7. *If any tutor is accused upon suspicion, his administration, according to* Papinian, *is suspended, whilest the accusation is under cognisance.*

Quibus modis cognitio finitur.

§ VIII. Sed, si suspecti cognitio suscepta fuerit, posteaque tutor vel curator decesserit, extinguitur suspecti cognitio.

§ 8. *If a suspected tutor or curator should die, pending the accusation, then the cognisance of it is extinguished.*

Si tutor copiam sui non faciat.

§ IX. Si quis tutor copiam sui non faciat, ut alimenta pupillo decernantur, cavetur epistola divorum Severi et Antonini, ut in possessionem bono-

bonorum ejus pupillus mittatur; et quæ mora deteriora futura ſunt, dato curatore, diſtrahi jubentur. Ergo ut ſuſpectus removeri poterit, qui non præſtat alimenta.

§ 9. *If a tutor fails to appear, with an intent to defer the appointment of an allowance for the maintenance of his pupil, it is provided by the conſtitution of* Severus *and* Antoninus, *that the pupil ſhall be put into the poſſeſſion of his tutor's effects; and that, a curator being appointed, thoſe things, which will be impaired by delay, may be immediately put to ſale. And therefore any tutor, who, by abſenting himſelf, impedes the grant of an allowance to his pupil, may be removed, as ſuſpected.*

Si neget alimenta decerni poſſe, vel tutelam redemerit.

§ X. Sed ſi quis præſens negat propter inopiam alimenta poſſe decerni, ſi hoc per mendacium dicat, remittendum eum eſſe ad præfectum urbi puniendum placuit: ſicut ille remittitur, qui, data pecunia, miniſterium tutelæ acquiſierit, vel redemerit.

§ 10. *But, if a tutor makes a perſonal appearance, and falſely avers, that the effects of his pupil are inſufficient for an allowance, ſuch tutor ſhall be remitted to the præfect of the city, and puniſhed by him in the ſame manner, as he, who hath acquired a tutelage by bribery.*

De liberto fraudulenter adminiſtrante.

§ XI. Libertus quoque, ſi fraudulenter tutelam filiorum vel nepotum patroni geſſiſſe probetur, ad præfectum urbi remittitur puniendus.

§ 11. *Alſo a freed-man, who is proved to have fraudulently adminiſtered the tutelage of the ſon, or grandſon of his patron, muſt be remitted to the præfect to be condignly puniſhed.*

Si ſuſpectus ſatis offerat; et quis dicatur ſuſpectus.

§ XII. Noviſſime autem ſciendum eſt, eos, qui fraudulenter tutelam adminiſtrant, etiamſi ſatis offerant, removendos eſſe à tutela; quia ſatisdatio tutoris propoſitum malevolum non mutat, ſed diutius graſſandi in re familiari facultatem præſtat. Suſpectum etiam eum putamus, qui moribus talis eſt, ut ſuſpectus ſit. Enimvero tutor vel curator, quamvis pauper ſit, fidelis tamen et diligens, removendus non eſt, quaſi ſuſpectus.

§ 12. *It is laſtly to be obſerved, that they, who unfaithfully adminiſter their truſt, muſt be immediately removed from it, altho' they tender a ſufficient caution. For the act of giving caution alters not the malevolent purpoſe of the tutor, but procures him a longer time for the continuance of his depredations. We alſo deem every man ſuſpected, whoſe immoralities give cauſe for it: but a tutor or curator, who, altho' poor, is yet faithful and diligent, can by no means be removed, as a ſuſpected perſon, merely on account of poverty.*

FINIS LIBRI PRIMI.

DIVI JUSTINIANI
INSTITUTIONUM
LIBER SECUNDUS.

TITULUS PRIMUS.

De rerum diviſione, et acquirendo earum dominio.

D. 1. T. 8. C. xli. T. 1.

Continuatio et duplex rerum diviſio.

SUPERIORE libro de jure perſonarum expoſuimus, modo videamus de rebus; quæ vel in noſtro patrimonio, vel extra patrimonium noſtrum, habentur. Quædam enim naturali jure communia ſunt omnium, quædam publica, quædam univerſitatis, quædam nullius, pleraque ſingulorum, quæ ex variis cauſis cuique acquiruntur, ſicut ex ſubjectis apparebit.

We have already treated of perſons in the foregoing book; let us now therefore inquire concerning things, which may be divided into thoſe, which can, and thoſe, which can not, come within our patrimony and be acquired; for ſome things are in common among mankind in general;— ſome are public;— ſome univerſal;— and ſome are ſuch, to which no man can have a right. But moſt things are the private property of individuals, by whom they are variouſly acquired, as will appear hereafter.

De aëre, aqua profluente, mari, littore, &c.

§ I. Et quidem naturali jure communia ſunt omnium hæc, aër, aqua profluens, mare, et per hoc littora maris. Nemo igitur ad littus maris accedere prohibetur; dum tamen à villis et monumentis et ædificiis abſtineat: quia non ſunt juris gentium, ſicut eſt mare.

§ 1. *Thoſe things, which are given to mankind in common by the law of nature, are the air, running water, the ſea, and conſequently the ſhores of the ſea: no man therefore is prohibited from approaching any part of the ſea-ſhore, whileſt he abſtains*

from committing acts of violence in deſtroying farms, monuments, edifices, &c. which are not in common, as the ſea is.

De fluminibus et portubus.

§ II. Flumina autem omnia, et portus, publica ſunt. Ideoque jus piſcandi omnibus commune eſt in portu fluminibuſque.

§ 2. *All rivers and ports are public; and therefore the right of fiſhing in a port, or in rivers, is in common.*

Definitio littoris.

§ III. Eſt autem littus maris, quatenus hybernus fluctus maximus excurrit.

§ 3. *All that tract of land, over which the greateſt winter flood extends itſelf, is the ſea-ſhore.*

De uſu et proprietate riparum.

§ IV. Riparum quoque uſus publicus eſt jure gentium, ſicut ipſius fluminis. Itaque naves ad eas appellere, funes arboribus ibi natis religare, onus aliquod in his reponere, cuilibet liberum eſt, ſicut per ipſum flumen navigare: ſed proprietas earum illorum eſt, quorum prædiis hærent: qua de cauſa arbores quoque in eiſdem natæ eorundem ſunt.

§ 4. *By the law of nations the uſe of the banks of rivers is alſo public, as the rivers themſelves are; and therefore all perſons have the ſame liberty to land their veſſels, to unload them, and to faſten ropes to trees upon the banks of a river, as they have to navigate upon the river itſelf. But, notwithſtanding this, the banks of a river are the property of thoſe, who poſſeſs the land, adjoining to ſuch banks; and therefore the trees, which grow upon them, are alſo the property of the ſame perſons.*

De uſu et proprietate littorum.

§ V. Littorum quoque uſus publicus eſt et juris gentium, ſicut et ipſius maris: et ob id cuilibet liberum eſt caſam ibi ponere, in quam ſe recipiat, ſicut retia ſiccare, et ex mari deducere. Proprietas autem eorum poteſt intelligi nullius eſſe; ſed ejuſdem juris eſſe, cujus et mare, et, quæ ſubjacet mari, terra vel arena.

§ 5. *The uſe of the ſea-ſhore is alſo public and common by the law of nations, as is the uſe of the ſea; and therefore any perſon is permitted to erect a cottage upon it, for his habitation, in which he may dry his nets, and preſerve them from the water; for the ſhores are not underſtood to be a property in any man, but are compared to the ſea itſelf, and to the ſand or ground, which is under the ſea.*

De rebus univerſitatis.

§ VI. Univerſitatis ſunt, non ſingulorum, quæ in civitatibus ſunt, theatra, ſtadia, et his ſimilia, et ſi qua alia ſunt communia civitatum.

§ 6. *Theaters, ground appropriated for a race or public exerciſes, and things of the like nature, which belong to a whole city, are univerſal, and not the property of any particular perſon.*

De

De rebus nullius.

§ VII. Nullius autem ſunt res ſacræ, et religioſæ, et ſanctæ: quod enim divini juris eſt, id nullius in bonis eſt.

§ 7. *Things ſacred, religious, and holy, cannot be veſted in any perſon, as his own: for that, which is of divine right, is* nullius in bonis, *and can be no man's property.*

De rebus ſacris.

§ VIII. Sacræ res ſunt, quæ rite per pontifices Deo conſecratæ ſunt; veluti ædes ſacræ, et donaria, quæ rite ad miniſterium Dei dedicata ſunt; quæ etiam per noſtram conſtitutionem alienari et obligari prohibuimus, excepta cauſa redemptionis captivorum. Si quis autem auctoritate ſua quaſi ſacrum ſibi conſtituerit, ſacrum non eſt, ſed profanum. Locus autem, in quo ædes ſacræ ſunt ædificatæ, etiam, diruto ædificio, ſacer adhuc manet, ut et Papianus ſcripſit.

§ 8. *Theſe things, which have been conſecrated by the pontiffs in due form, are eſteemed ſacred; ſuch are churches, chapels, and alſo all moveable things, if they have been properly dedicated to the ſervice of God: and we have forbidden by our conſtitution, that theſe things ſhould be either aliened or obligated, unleſs for the redemption of captives. But, if a man ſhould conſecrate a building merely by his own authority, it would not be rendered ſacred by ſuch a conſecration; but the very ground, upon which a ſacred edifice hath once been erected, will, according to* Papinian, *continue to be ſacred, altho' the edifice is deſtroyed.*

Per noſtram conſtitutionem.] *Cod. 1. t. 2. l. 22. de ſacro-ſanctis eccleſiis.*

De religioſis.

§ IX. Religioſum locum unuſquiſque ſua voluntate facit, dum mortuum infert in locum ſuum. In communem autem locum purum, invito ſocio, inferre non licet: in commune vero ſepulchrum etiam, invitis cæteris, licet inferre. Item, ſi alienus uſusfructus eſt, proprietarium placet, niſi conſentiente uſufructuario, locum religioſum non facere. In alienum locum, conſentiente domino, licet inferre; et, licet poſtea ratum non habuerit, quam illatus eſt mortuus, tamen locus religioſus fit.

§ 9. *Any man may at his will render any place, which belongs ſolely to himſelf, religious, by making it the repoſitory of a dead body; yet, when two are joint poſſeſſors of a place or ſpot of ground, not before uſed for ſuch a purpoſe, it is not in the power of the one, without the conſent of the other, to cauſe it to become religious. But, when there is a ſepulcher in common among many, it is in the power of any one joint-poſſeſſor to make uſe of it, altho' the reſt ſhould diſſent. And, when there is a proprietor, and an uſufructuary, of the ſame place, the proprietor, without the conſent of the uſufructuary, can not render it religious. But it is lawful to lay the body of a dead perſon in a place, belonging to any man, who has given his conſent to it; and, altho' he ſhould diſſent after the burial, yet the place becomes religious.*

De

De rebus ſanctis.

§ X. Sanctæ quoque res, veluti muri et portæ civitatis, quodammodo divini juris ſunt; et ideo nullius in bonis ſunt. Ideo autem muros ſanctos dicimus, quia pœna capitis conſtituta eſt in eos, qui aliquid in muros deliquerint. Ideo et legum eas partes, quibus pœnas conſtituimus adverſus eos, qui contra leges fecerint, ſanctiones vocamus.

§ 10. *Holy things alſo, as the walls and gates of a city, are in ſome degree of divine right, and therefore the property of no man. The walls of a city are eſteemed* ſancti *or holy, inaſmuch as any offence againſt them is always puniſhed capitally; and therefore all thoſe parts of the laws, by which puniſhments are inflicted upon tranſgreſſors, we generally term* ſanctions.

De rebus ſingulorum.

XI. Singulorum autem hominum multis modis res fiunt: quarundam enim rerum dominium nanciſcimur jure naturali, quod ſicut diximus, appellatur jus gentium: quarundam vero jure civili. Commodius eſt itaque à vetuſtiore jure incipere. Palam eſt autem, vetuſtius eſſe jus naturale, quod cum ipſo genere humano rerum natura prodidit. Civilia autem jura tunc eſſe cœperunt, cum et civitates condi, et magiſtratus creari, et leges ſcribi, cœperunt.

§ 11. *There are various means, by which things become the property of private perſons. Of ſome things we obtain dominion and property by the law of nature, which (as we have already obſerved) is alſo called the law of nations: and we acquire a property in other things by the civil law. But it will be moſt convenient to begin from the more antient law: and that the law, which nature eſtabliſhed at the birth of mankind, is the moſt antient, appears evident: for civil laws could then only commence to exiſt, when cities began to be built, magiſtrates to be created, and laws to be written.*

De occupatione ferarum.

§ XII. Feræ igitur beſtiæ, et volucres, et piſces, et omnia animalia, quæ mari cœlo et terra naſcuntur, ſimul atque ab aliquo capta fuerint, jure gentium ſtatim illius eſſe incipiunt: quod enim ante nullius eſt, id naturali ratione occupanti conceditur: nec intereſt, feras beſtias et volucres utrum in ſuo fundo quis capiat, an in alieno. Plane, qui alienum fundum ingreditur venandi aut aucupandi gratia, poteſt à domino, ſi is prævíderit, prohiberi ne ingrediatur. Quicquid autem eorum ceperis, eo uſque tuum eſſe intelligitur, donec tua cuſtodia coërcetur. Cum vero tuam evaſerit cuſtodiam, et in libertatem naturalem ſeſe receperit, tuum eſſe deſinit, et rurſus occupantis fit. Naturalem autem libertatem recipere intelligitur, cum vel oculos tuos effugerit, vel ita ſit in conſpectu tuo, ut difficilis ſit ejus perſecutio.

§ 12. *Wild beaſts, birds, fiſh, and all the animals, which are bred either in the ſea, the air, or upon the earth, do, as ſoon as they are taken, become inſtantly, by*

by the law of nations, the property of the captor: for it is agreeable to natural reaſon, that thoſe things, which have no owner, ſhould become the property of the firſt occupant: and it is not material, whether they then are taken by a man upon his own ground, or upon the ground of another: but yet it is certain, that whoever hath entered into the ground of another for the ſake of hunting or fowling, might have been prohibited from entering by the proprietor of the ground, if he had foreſeen the intent. But, tho' wild beaſts, or fowl, when taken, are eſteemed to be the property of the captor, whileſt they continue in his cuſtody; yet, when they have once eſcaped and recovered their natural liberty, the right of the captor ceaſes, and they become the property of the firſt, who ſeizes them. And they are underſtood to have recovered their natural liberty, if they have run or flown out of ſight; and even if they are not out of ſight, when it ſo happens that they can not without difficulty be perſued and retaken.

De vulneratione.

§ XIII. Illud quæſitum eſt, an ſi fera beſtia ita vulnerata ſit, ut capi poſſit, ſtatim tua eſſe intelligatur. Et quibuſdam placuit, ſtatim eſſe tuam, et, eouſque tuam videri, donec eam perſequaris: quod ſi deſieris perſequi, deſinere tuam eſſe, et rurſus fieri occupantis: alii vero putaverunt, non aliter tuam eſſe, quam ſi eam ceperis. Sed poſteriorem ſententiam nos confirmamus, quod multa accidere ſoleant, ut eam non capias.

§ 13. *It hath been a queſtion, whether a wild beaſt is underſtood to belong to him, by whom it hath been ſo wounded, that it may eaſily be taken. And, in the opinion of ſome, it belongs to ſuch perſon, as long as he perſues it; but, if he quits the perſuit, they ſay it ceaſes to be his, and again becomes the right of the firſt* occupant. *But others have thought, that the property in a wild beaſt can not otherwiſe be obtained, than by actually taking it. And we confirm this latter opinion, becauſe many accidents frequently happen, which prevent the capture.*

De apibus.

§ XIV. Apium quoque fera natura eſt. Itaque apes, quæ in arbore tua conſederint, antequam à te alveo includantur, non magis tuæ intelliguntur eſſe, quam volucres, quæ in arbore tua nidum fecerint: ideoque, ſi alius eas incluſerit, is earum dominus erit. Favos quoque, ſi quos effecerint, eximere quilibet poteſt. Plane integra re, ſi prævideris ingredientem fundum tuum, poteris eum jure prohibere, ne ingrediatur. Examen quoque, quod ex alveo tuo evolaverit, eouſque intelligitur eſſe tuum, donec in conſpectu tuo eſt, nec difficilis perſecutio ejus eſt; alioquin occupantis fit.

§ 14. *Bees alſo are wild by nature; and therefore, altho' they ſwarm upon a tree, which is yours, they are not reputed, until they are hived by you, to be more your property, than the birds, which have neſts there: and therefore, if any other perſon ſhall incloſe them in a hive, he thus becomes their proprietor. Their honycombs alſo become the property of him, who takes them: but, if you obſerve any perſon entering into your ground, with that intent, you may juſtly hinder him. A ſwarm, which hath flown from your hive, is ſtill reputed to continue yours, as long as it remains in ſight, and may eaſily be perſued; but, in any other caſe, it will become the property of the* occupant.

De

De pavonibus et columbis, et cæteris animalibus manſuefactis.

§ XV. Pavonum quoque et columbarum fera natura eſt; nec ad rem pertinet, quod ex conſuetudine evolare et revolare ſolent: nam et apes idem faciunt, quarum conſtat feram eſſe naturam. Cervos quoque quidam ita manſuetos habent, ut in ſilvam ire et redire ſoleant, quorum et ipſorum feram eſſe naturam nemo negat. In iis autem animalibus, quæ ex conſuetudine abire et redire ſolent, talis regula comprobata eſt; ut eouſque tua eſſe intelligantur, donec animum revertendi habeant: nam, ſi revertendi animum habere deſierint, etiam tua eſſe deſinunt, et fiunt occupantium. Revertendi autem animum videntur deſinere habere tunc, cum revertendi conſuetudinem deſeruerint.

§ 15. *Peacocks and Pidgeons are alſo naturally wild; nor is it any objection to ſay, that, after every flight, it is their cuſtom to return: for bees do the ſame thing; and, that bees are naturally wild, is evident. Some have been known to have trained deer to be ſo tame, that they would go into, and return from the woods, at regular periods: and yet no man denies, but that deer are wild by nature. But, with reſpect to theſe animals, which go and return cuſtomarily, the rule to be obſerved is, that they are underſtood to be yours, as long as they appear to retain an inclination to return: but, if this inclination ceaſes, that they ceaſe to be yours; and will again become the property of him, who takes them. And theſe animals ſeem then to ceaſe to have an inclination to return, when they diſuſe the cuſtom of returning.*

De gallinis et anſeribus.

§ XVI. Gallinarum autem et anſerum non eſt fera natura: idque ex eo poſſumus intelligere, quod aliæ ſunt gallinæ, quas feras vocamus: item alii ſunt anſeres, quos feros appellamus. Ideoque, ſi anſeres tui, aut gallinæ tuæ, aliquo modo turbati turbatæve evolaverint, licet conſpectum tuum effugerint, quocumque tamen loco ſint, tui tuæve eſſe intelliguntur: et, qui lucrandi animo ea animalia detinet, furtum committere intelligitur.

§ 16. *But geeſe, and fowls, are not wild by nature; and this we are induced to obſerve, becauſe there is a ſpecies of fowls, and a ſpecies of geeſe, which in contradiſtinction we term wild: and therefore, if the geeſe, or fowls of* Titius, *being diſturbed and frightened, ſhould take flight, they are nevertheleſs reckoned to belong to him, in whatever place they are found, altho' he ſhall have loſt ſight of them: and whoever detains ſuch animals, with a lucrative view, is underſtood to commit a theft.*

De occupatione in bello.

§ XVII. Item ea, quæ ex hoſtibus capimus, jure gentium ſtatim noſtra fiunt: adeo quidem, ut et liberi homines in ſervitutem noſtram deducantur: qui tamen, ſi evaſerint noſtram poteſtatem, et ad ſuos reverſi fuerint, priſtinum ſtatum recipiunt.

§ 17. *All thoſe things, which we take from our enemies in war, become inſtantly our own by the law of nations: ſo that free-men may be brought into a ſtate of ſervitude by capture: but, if they afterwards eſcape, and ſhall have returned to their own people, they then obtain again their former ſtate.*

De occupatione eorum, quæ in littore inveniuntur.

§ XVIII. Item lapilli, et gemmæ, et cætera, quæ in littore maris inveniuntur, jure naturali ſtatim inventoris fiunt.

§ 18. *Pretious ſtones, pearls, and other things, which are found upon the ſea-ſhore, become inſtantly, by the law of nations, the property of the finder.*

De fœtu animalium.

§ XIX. Item ea, quæ ex animalibus dominio tuo ſubjectis nata ſunt, eodem jure tibi acquiruntur.

§ 19. *The product of thoſe animals, of which we are the owners and maſters, is, by the ſame law, eſteemed to be our own.*

De alluvione.

§ XX. Præterea, quod per alluvionem agro tuo flumen adjecit, jure gentium tibi acquiritur. Eſt autem alluvio incrementum latens. Per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intelligi non poſſit, quantum quoque temporis momento adjiciatur.

§ 20. *And farther— that ground, which a river hath added to your eſtate by alluvion,* [i. e. *by an imperceptible increaſe*] *is properly acquired by you according to the law of nations. And that is ſaid to be added by* alluvion, *which is added in a manner, which renders it impoſſible to judge, how much ground is added in the ſpace of each moment of time.*

De vi fluminis.

§ XXI. Quod ſi vis fluminis de tuo prædio partem aliquam detraxerit, et vicini prædio attulerit, palam eſt, eam tuam permanere. Plane ſi longiore tempore fundo vicini tui hæſerit; arboreſque, quas ſecum traxerit, in eum fundum radices egerint; ex eo tempore videntur vicini fundo acquiſitæ eſſe.

§ 21. *But, if the impetuoſity of a river ſhould ſever any part of your eſtate, and adjoin it to that of your neighbour, it is certain, that ſuch part would ſtill continue yours; but if it ſhould remain, for a long time, joined to the eſtate of your neighbour, and the trees, which accompanied it, ſhall have taken root, in his ground, ſuch trees ſeem, from the time of their taking root, to be gained and acquired to his eſtate.*

De inſula.

§ XXII. Inſula, quæ in mari nata eſt (quod raro accidit) occupantis fit: nullius enim eſſe creditur. At inſula in flumine nata (quod frequenter accidit) ſi quidem mediam partem fluminis tenet, communis eſt eorum,

qui ab utraque parte fluminis prope ripam prædia poſſident, pro modo ſcilicet latitudinis cujuſque prædii, quæ prope ripam ſit. Quod ſi alteri proximior ſit parti, eorum eſt tantum, qui ab ea parte prope ripam prædia poſſident. Quod ſi qua parte diviſum ſit flumen, deinde infra unitum, agrum alicujus in formam inſulæ redegerit, ejuſdem permanet is ager, cujus et fuerat.

§ 22. *When an iſland riſes in the ſea, (an event which rarely happens) the property of it is in the occupant; for the property, before occupation, is in no man. But, if an iſland riſes in a river, (which frequently happens) and is placed exactly in the middle of it, ſuch iſland ſhall be in common to them, who poſſeſs the lands near the banks on each ſide of the river, according to the proportion of the extent and latitude of each man's eſtate, adjoining to the banks. But, if the iſland is nearer to one ſide, than the other, it belongs to them only, who poſſeſs lands next to the banks on that ſide, to which the iſland is neareſt. But, if a river divides itſelf and afterwards unites again, having reduced a tract of land into the form of an iſland, the land ſtill continues to be the property of him, to whom it before appertained.*

De alveo.

XXIII. Quod ſi, naturali alveo in univerſum derelicto, ad aliam partem fluere cœperit; prior quidem alveus eorum eſt, qui prope ripam ejus prædia poſſident, pro modo ſcilicet latitudinis cujuſque agri, quæ prope ripam ſit: novus autem alveus ejus juris eſſe incipit, cujus et ipſum flumen eſt, id eſt, publici. Quod ſi poſt aliquod tempus ad priorem alveum reverſum fuerit flumen, rurſus novus alveus eorum eſſe incipit, qui prope ripam ejus prædia poſſident.

§ 23. *If a river, intirely forſaking its natural channel, hath begun to flow elſewhere, the firſt channel appertains to thoſe, who poſſeſs the lands, cloſe to the banks of it, in proportion to the breadth of each man's eſtate, next to ſuch banks: and the new channel partakes of the nature of the river, and becomes public. And, if after ſome time the river ſhall return to its former channel, the new channel commences to be the property of thoſe, who poſſeſs the lands, contiguous to the banks of it.*

De inundatione.

§ XXIV. Alia ſane cauſa eſt, ſi cujus totus ager inundatus fuerit; neque enim inundatio fundi ſpeciem commutat: et ob id, ſi receſſerit aqua, palam eſt eum fundum ejus manere, cujus et fuit.

§ 24. *But it is otherwiſe in reſpect to lands, which are overflowed only; for an inundation alters not the face and nature of the earth; and therefore, when the waters have receded, it is apparent, that the property will be found ſtill to remain in him, in whom it was veſted before the inundation.*

De ſpecificatione.

§ XXV. Cum ex aliena materia ſpecies aliqua facta ſit ab aliquo, quæri ſolet, quis eorum naturali ratione dominus ſit: utrum is, qui fecerit, an potius ille, qui materiæ dominus fuerit: ut ecce, ſi quis ex alienis uvis,

aut

aut olivis, aut ſpicis, vinum, aut oleum, aut frumentum, fecerit: aut ex alieno auro, vel argento, vel ære, vas aliquod fecerit: vel ex alieno vino et melle mulſum miſcuerit: vel ex medicamentis alienis emplaſtrum aut collyrium compoſuerit: vel ex aliena lana veſtimentum fecerit: vel ex alienis tabulis navem, vel armarium, vel ſubſellia, fabricaverit. Et, poſt multam Sabinianorum et Proculianorum ambiguitatem, placuit media ſententia exiſtimantium, ſi ea ſpecies ad priorem et rudem materiam reduci poſſit, eum videri dominum eſſe, qui materiæ dominus fuerit: ſi non poſſit reduci, eum potius intelligi dominum, qui fecerit: ut ecce, vas conflatum poteſt ad rudem materiam æris, vel argenti, vel auri, reduci: vinum autem, vel oleum, aut frumentum, ad uvas, vel olivas, vel ſpicas, reverti non poteſt: ac ne mulſum quidem ad vinum et mel reſolvi poteſt. Quod ſi partim ex ſua materia, partim ex aliena, ſpeciem aliquam fecerit quis; veluti ex ſuo vino et alieno melle mulſum miſcuerit; aut ex ſuis et alienis medicamentis emplaſtrum aut collyrium; aut ex ſua lana et aliena veſtimentum fecerit; dubitandum non eſt, hoc caſu eum eſſe dominum, qui fecerit: cum non ſolum operam ſuam dederit, ſed et partem ejuſdem materiæ præſtiterit.

§ 25. *When a man hath made any* ſpecies, *or kind of work, with materials, belonging to another, it is often demanded, which of them ought, in natural reaſon, to be deemed the maſter of it;—— whether he, who made the* ſpecies; *or he, who was the undoubted owner of the materials? as, for inſtance, if any perſon ſhould make wine, oil, or flower, from the grapes, olives, or corn of another,—— ſhould caſt a veſſel out of gold, ſilver, or braſs, belonging to another man,—— ſhould make a liquor, called* mulſe, *with the wine and honey of another,—— ſhould compoſe a plaſter or collyrium, with another man's medicines,—— ſhould make a garment with another's wool,—— or ſhould fabricate, with the timber of another, a bench, a ſhip, or an armory?—— And after much controverſy, concerning this queſtion, between the* Sabinians *and* Proculians, *the opinion of thoſe, who kept a mean between the two parties, proved moſt ſatisfactory to us: and their opinion was this;—— that, if the* ſpecies *can be reduced to its former, rude materials, then the maſter of ſuch materials is alſo to be reckoned the maſter of the new* ſpecies: *but, if the* ſpecies *can not be ſo reduced, then he, who made it, is underſtood to be the maſter of it: for example; a veſſel can eaſily be reduced to the rude maſs of braſs, ſilver, or gold of which it was made; but wine, oil, or flower, can not be converted into grapes, olives, or corn; neither can* mulſe *be reſolved and ſeparated into wine and honey. But, if a man makes any ſpecies, partly with his own materials, and partly with the materials of another: as, for inſtance, if he ſhould make* mulſe *with his own wine, and another's honey; or a plaſter, or eye-water, partly with his own, and partly with another man's medicines; or ſhould make a garment with an intermixture of his own wool with the wool of another,—— it is not to be doubted in all ſuch caſes, but that he, who made the* ſpecies, *is maſter of it, ſince he not only gave his labor, but furniſhed alſo a part of the materials.*

Sabinianorum et Proculianorum.] The two ſects of *Sabinians* and *Proculians* took their riſe in the reign of *Auguſtus*, but were not diſtinguiſhed by any particular appellation, 'till long afterwards: for the *Sabinians* obtained their name from *Sabinus*, who was a favorite of the emperor *Tiberius*; and the *Proculians* were ſo called from *Proculus*, who floriſhed under *Veſpaſian*.

paſian. It is generally held, that *Atteius Capito*, who lived in the *Auguſtan* age, and was a perſon remarkable for his great attachment to precedents and old cuſtoms, was the chief of the *Sabinians*; and that *Antiſtius Labeo*, his cotemporary, who did not confine himſelf wholly to rules, but followed principally the dictates of reaſon and his own underſtanding, was the head of the *Proculian* ſect. Theſe ſects continued in vogue to the reign of *Marcus Aurelius*, till which time the ſtudents of the law generally attached themſelves to either the one, or the other. But the lawyers of that reign affected neither party in particular; for at different times they diſpaſſionately approved the opinions of either ſect, as they judged them more or leſs agreeable to juſtice and right reaſon: and they generally indeavored by an equal temperature to avoid the abſurdities, into which both parties, by reaſon of their great diſlike and oppoſition to each other, had frequently fallen. *ff.* 1. *de origine juris. Hiſt. du droit Romain, par* Claude Ferriere.

Theſe lawyers (who from their conduct were denominated *Eriſcundi*, from the old verb *eriſcere* to divide) are the perſons, hinted at by *Juſtinian* in this paragraph; as obſerving a juſt mean between the two parties.

De acceſſione.

§ XXVI. Si tamen alienam purpuram veſtimento ſuo quis intexuerit, licet pretioſior ſit purpura, tamen acceſſionis vice cedit veſtimento: et qui dominus fuit purpuræ, adverſus eum, qui ſurripuit, habet furti actionem et condictionem, ſive ipſe ſit, qui veſtimentum fecit, ſive alius. Nam extinctæ res licet vindicari non poſſint, condici tamen à furibus et quibuſque aliis poſſeſſoribus poſſunt.

§ 26. *If any man ſhall have interwoven the purple of another into his own veſtment, then the purple, altho' it may be more valuable, doth yield and appertain to the veſtment by acceſſion: and he, who was the owner of the purple, may have an action of theft, and a perſonal action, called a* condiction, *againſt the purloiner; nor is it of any conſequence, whether the veſtment was made by him, who committed the theft, or by another: for altho' things, which become, as it were, extinct by the change of their form, can not be recovered identically, yet a* condiction *may be brought for the recovery of the value of them, either againſt the thief, or againſt any other poſſeſſor.*

De confuſione.

§ XXVII. Si duorum materiæ voluntate dominorum confuſæ ſint, totum id corpus, quod ex confuſione fit, utriuſque commune eſt: veluti ſi qui vina ſua confuderint, aut maſſas argenti vel auri conflaverint. Sed, etſi diverſæ materiæ ſint, et ob id propria ſpecies facta ſit, forte ex vino et melle mulſum, aut ex auro et argento electrum, idem juris eſt. Nam et hoc caſu, communem eſſe ſpeciem, non dubitatur. Quod ſi fortuito et non voluntate dominorum confuſæ fuerint vel ejuſdem generis materiæ, vel diverſæ, idem juris eſſe placuit.

§ 27. *If the materials of two perſons are incorporated together, then the whole maſs, or compoſition, is common to both the proprietors: for inſtance, if two owners ſhall have intermixed their wines, or ſhall have melted together their gold or their ſilver. The ſame rule is alſo obſerved, if diverſe ſubſtances are ſo incorporated, as to become one* ſpecies: *as when* mulſe *is made with wine and honey; or when an* electrum *is compoſed by an intermixture of gold and ſilver in different proportions: for in theſe caſes it is not doubted, but that the ſpecies becomes common. Neither is any other rule obſerved, when either homogeneous, or even different ſubſtances, are confounded and incorporated together fortuitouſly, without the conſent of their proprietors.*

De

De commixtione.

§ XXVIII. Quod ſi frumentum Titii frumento tuo miſtum fuerit, ſiquidem voluntate veſtra, commune eſt; quia ſingula corpora, id eſt, ſingula grana, quæ cujuſque propria fuerunt, conſenſu veſtro communicata ſunt. Quod ſi caſu id miſtum fuerit, vel Titius id miſcuerit ſine tua voluntate, non videtur commune eſſe: quia ſingula corpora in ſua ſubſtantia durant. Sed nec magis iſtis caſibus commune fit frumentum, quam grex intelligitur eſſe communis, ſi pecora Titii tuis pecoribus miſta fuerint. Sed, ſi ab alterutro veſtrum totum id frumentum retineatur, in rem quidem actio pro modo frumenti cujuſque competit: arbitrio autem judicis continetur, ut ipſe æſtimet, quale cujuſque frumentum fuerit.

§ 28. *If the corn of* Titius *hath been mixed with the corn of another by conſent, then the whole is in common; becauſe the ſingle bodies, or grains, which were the private property of each, are, by the mutual conſent, made common. But, if the intermixture was accidental, or if* Titius *made it without conſent, it then ſeems, that the corn is not in common; becauſe the ſingle grains ſtill remain ununited, and in their proper ſubſtance: for corn, in ſuch a caſe, is no more underſtood to be in common, than a flock would be, if the ſheep of* Titius *ſhould accidentally intermix with the ſheep of another. But, if the whole quantity of corn ſhould be retained by either of the parties, then an action* in rem *lies for the quantity of each man's corn: and it is the buſineſs and duty of the judge to make an exact eſtimate of the* quality *of the corn, belonging to each party.*

De his quæ ſolo cedunt. De ædificatione in ſuo ſolo ex aliena materia.

§ XXIX. Cum in ſuo ſolo aliquis ex aliena materia ædificaverit, ipſe intelligitur dominus ædificii: quia omne, quod ſolo inædificatur, ſolo cedit. Nec tamen ideo is, qui materiæ dominus fuerat, deſinit dominus ejus eſſe: ſed tantiſper neque vindicare eam poteſt, neque ad exhibendum de ea re agere, propter legem duodecim tabularum, qua cavetur, ne quis tignum alienum ædibus ſuis junctum eximere cogatur, ſed duplum pro eo præſtet, per actionem, quæ vocatur, *de tigno juncto.* Appellatione autem tigni omnis materia ſignificatur, ex qua ædificia fiunt. Quod ideo proviſum eſt, ne ædificia reſcindi neceſſe ſit. Quod ſi aliqua ex cauſa dirutum ſit ædificium, poterit materiæ dominus, ſi non fuerit duplum jam conſequutus, tunc eam vindicare, et ad exhibendum de ea re agere.

§ 29. *When any man hath raiſed a building upon his own ground, he is underſtood to be the proprietor of ſuch building, altho' the materials, uſed in it, were the property of another: for every building is an acceſſion to the ground, upon which it ſtands. But, notwithſtanding this, he, who was the owner of the materials, does not ceaſe to be the owner; yet he cannot demand his materials, or bring an action for the exhibition of them; for it is provided, by a law of the twelve tables, that a perſon, whoſe houſe is built with the materials of another, can not be compelled to reſtore thoſe materials; but, by an action, intituled* de tigno juncto, *he may be obliged to pay*

pay double the value: and here note, that all the materials for building are comprehended under the general term tignum. *The above cited proviſion, in the law of the twelve tables, was made to prevent the demolition of buildings. But, if it happens, that, by any cauſe, a building ſhould be diſſevered, or pulled down, then the owner of the materials, if he hath not already obtained double the value of them, is not prohibited to claim his identical materials, and to bring his action* ad exhibendum.

De ædificatione ex ſua materia in ſolo alieno.

§ XXX. Ex diverſo, ſi quis in alieno ſolo ex ſua materia domum ædificaverit, illius ſit domus, cujus et ſolum eſt. Sed hoc caſu materiæ dominus proprietatem ejus amittit, quia voluntate ejus intelligitur eſſe alienata; utique ſi non ignorabat, ſe in alieno ſolo ædificare: et ideo, licet diruta ſit domus, materiam tamen vindicare non poteſt. Certe illud conſtat, ſi, in poſſeſſione conſtituto ædificatore, ſoli dominus petat, domum ſuam eſſe, nec ſolvat pretium materiæ et mercedes fabrorum, poſſe eum per exceptionem doli mali repelli; utique ſi bonæ fidei poſſeſſor fuerit, qui ædificavit. Nam ſcienti, ſolum alienum eſſe, poteſt objici culpa, quod ædificaverit temere in eo ſolo, quod intelligebat alienum eſſe.

§ 30. *On the contrary, if a man ſhall have built an edifice with his own materials upon the ground of another, ſuch edifice becomes the property of him, to whom the ground appertains: for, in this caſe, the owner of the materials loſes his property, becauſe he is underſtood to have made a voluntary alienation of it: and this is the law, if he was not ignorant, that he was building upon another's land: and therefore, if the edifice ſhould fall, or be pulled down, ſuch perſon can even then have no claim to the materials. But it is apparent, if the proprietor of the ground, of which the builder was in confirmed poſſeſſion, ſhould plead, that the edifice is his; and refuſe to pay the price of the materials and the wages of the workmen, that then ſuch proprietor may be repelled by an* exception *of* fraud: *and this may aſſuredly be done, if the builder was the poſſeſſor of the ground* bona fide. *But it may be juſtly objected to any man, who underſtood, that the land appertained to another, "that "he hath built raſhly upon that ground, which he knew to be the property of an-"other."*

De plantatione.

§ XXXI. Si Titius alienam plantam in ſolo ſuo poſuerit, ipſius erit; et ex diverſo, ſi Titius ſuam plantam in Mævii ſolo poſuerit, Mævii planta erit: ſi modo utroque caſu radices egerit: ante enim quam radices egerit, ejus permanet, cujus fuerat. Adeo autem ex eo tempore, quo radices egerit planta, proprietas ejus commutatur, ut, ſi vicini arbor ita terram Titii preſſerit, ut in ejus fundum radices egerit, Titii effici arborem dicamus: ratio enim non patitur, ut alterius arbor eſſe intelligatur, quam cujus in fundum radices egerit. Et ideo circa confinium arbor poſita, ſi etiam in vicini fundum radices egerit, communis fit.

§ 31. *If* Titius *ſets another man's plant in his own ground, the plant will become the property of* Titius: *and, on the contrary, if* Titius *ſhall have ſet his own plant in* Mævius's *ground, the plant will appertain to* Mævius; *on ſuppoſition in either caſe,*

caſe, that it hath already taken root; for, until then, the property of the plant remains ſtill in him, by whom it was planted. But from the inſtant, in which a plant hath taken root, the property of it is changed: ſo that, if the tree of a neighbour borders ſo cloſely upon the ground of Titius, *as to take root in it,* and be wholly nouriſhed there, *we may affirm, that ſuch tree is become the property of* Titius: *for reaſon doth not permit, that a tree ſhould be deemed the property of any other, than of him, in whoſe ground it hath caſt it's roots. And therefore, if a tree, planted near the bounds of the lands of one perſon, ſhall alſo extend it's roots into the lands of another, ſuch tree will become common to both the land-proprietors.*

De ſatione.

§ XXXII. Qua ratione autem plantæ, quæ terræ coaleſcunt, ſolo cedunt, eadem ratione frumenta quoque, quæ ſata ſunt, ſolo cedere intelliguntur. Cæterum ſicut is, qui in alieno ſolo ædificavit, ſi ab eo dominus petat ædificium, defendi poteſt per exceptionem doli mali, ſecundum ea, quæ diximus: ita ejuſdem exceptionis auxilio tutus eſſe poteſt is, qui alienum fundum ſua impenſa bona fide conſevit.

§ 32. *As all plants are eſteemed to appertain to the ſoil, in which they have rooted, ſo every kind of grain is alſo underſtood to follow the property of that ground, in which it is ſowed. But as he, who hath built upon the ground of another, may (according to what we have already ſaid) be defended by an* exception *of* fraud, *if the proprietor of the ground ſhould demand the edifice; ſo he, who at his own expenſe and* bona fide, *hath ſowed in another man's land, may alſo be benefited by the help of this* exception.

De ſcriptura.

§ XXXIII. Literæ quoque, licet aureæ ſint, perinde chartis membraniſve cedunt, ac ſolo cedere ſolent ea, quæ inædificantur, aut inſeruntur. Ideoque, ſi in chartis membraniſve tuis carmen vel hiſtoriam vel orationem Titius ſcripſerit, hujus corporis non Titius, ſed tu dominus eſſe videris. Sed, ſi à Titio petas tuos libros, tuaſve membranas, nec impenſas ſcripturæ ſolvere paratus ſis, poterit ſe Titius defendere per exceptionem doli mali, utique ſi earum chartarum membranarumve poſſeſſionem bona fide nactus eſt.

§ 33. *As whatever is built upon, or ſowed in the ground, belongs to that ground by acceſſion; ſo letters alſo, altho' written with gold, do appertain to the paper or parchment, upon which they are written. And therefore, if* Titius *ſhall have written a poem, an hiſtory, or an oration, upon the paper or parchment of* Seius, *then* Titius *will not be deemed the maſter of his own work, but the whole will be reputed to be* Seius's *property. But if* Seius *demands his books or parchments from* Titius, *and at the ſame time refuſes to defray the expenſe of the writing, then* Titius *can defend himſelf by an* exception *of* fraud: *and this he may certainly do, if he was in poſſeſſion of ſuch papers and parchments* bona fide; *that is, honeſtly, and believing them to be his own.*

De

De pictura.

§ XXXIV. Si quis in aliena tabula pinxerit, quidam putant tabulam picturæ cedere: aliis videtur, picturam (qualiscunque sit) tabulæ cedere: sed nobis videtur melius esse, tabulam picturæ cedere: ridiculum est enim, picturam Apellis vel Parrhasii in accessionem vilissimæ tabulæ cedere. Unde si à domino tabulæ imaginem possidente is, qui pinxit, eam petat, nec solvat pretium tabulæ, poterit per exceptionem doli mali submoveri. At si is, qui pinxit, eam possideat, consequens est, ut utilis actio domino tabulæ adversus eum detur: quo casu, si non solvat impensam picturæ, poterit per exceptionem doli mali repelli: utique si bonæ fidei possessor fuerit ille, qui picturam imposuit. Illud enim palam est, quod sive is, qui pinxit, surripuit tabulas, sive alius, competit domino tabularum furti actio.

§ 34. *If any man shall have painted upon the tablet of another, some think, that the tablet should yield and accede to the picture: but it is the opinion of others, that the picture (whatever the quality of it may be) should accede to the tablet. But it appears to us to be the better opinion, that the tablet should accede to the picture; for it seems ridiculous, that the painting of an* Apelles, *or a* Parrhasius, *should yield, as an accession, to a worthless tablet. But if he, who hath painted upon a tablet, demands it from the owner and possessor, and offers not the price of it, then such demandant may be defeated by an* exception *of* fraud: *but, if the painter is in possession of the picture, the owner of the tablet is intituled to an action called* utilis, *i. e.* beneficial; *in which case, if the owner of the tablet demands it, and does not tender the value of the picture, he may also be repelled by an* exception *of* fraud, *if he, who painted upon the tablet, was the possessor of it upon good faith. But, if he, who hath painted upon it, or any other, shall have taken away a tablet feloniously, it is evident, that the owner of it may prosecute such person by an action of theft.*

De fructibus bona fide perceptis.

§ XXXV. Si quis à non domino, quem dominum esse crediderit, bona fide fundum emerit, vel ex donatione, aliave qualibet justa causa, æque bona fide acceperit, naturali ratione placuit, fructus, quos percepit, ejus esse pro cultura et cura: et ideo, si postea dominus supervenerit, et fundum vindicet, de fructibus ab eo consumptis agere non potest. Ei vero, qui alienum fundum sciens possederit, non idem concessum est: itaque cum fundo etiam fructus, licet consumpti sint, cogitur restituere.

§ 35. *If any man shall have purchased lands from another, believing the seller to have been the true owner, when in fact he was not, or shall have obtained an estate* bona fide, *either by donation, or any other just means, it is agreeable to natural reason, that the fruits, which he shall have gathered, shall be reckoned to have become his own, on account of his care in the culture and tillage. And therefore, if the true owner shall afterwards appear and claim his lands, he can have no action against the* bona fide *possessor, for those fruits and that product, which have been consumed. But this exemption from such an action is not granted to him, who knowingly keeps possession of another's estate; and therefore, when ever there is a* mala fides, *the possessor is compellable to restore all the mesne profits together with the lands.*

De

De fructibus ab eo conſumptis.] The law of *England* ſeems in general agreeable to this doctrine. *vid. 2d chan. caſ.* 144. *Bac. abr.* account.

Stat. of Gloceſter, 6 Edw. 1. cap. 1. 2. Co. inſt. 284, &c.

A fructuario et colono perceptis.

§ XXXVI. Is vero, ad quem uſusfructus fundi pertinet, non aliter fructuum dominus efficitur, quam ſi ipſe eos perceperit. Et ideo licet maturis fructibus, nondum tamen perceptis, deceſſerit, ad hæredes ej usnon pertinent, ſed domino proprietatis acquiruntur. Eadem fere et de colono dicuntur.

§ 36. *He, to whom the uſufruct of lands belongs, can gain no property in the fruits of ſuch lands, until he hath actually gathered them; and therefore, if the uſufructuary ſhould die, whileſt the fruits, altho' ripe, are yet ungathered, they could not be claimed by his heirs, but would be acquired by the proprietor of the lands; and the ſame may be ſaid in general, in relation to farmers.*

Quæ ſunt in fructu.

§ XXXVII. In pecudum fructu etiam fœtus eſt, ſicuti lac, pilus, et lana: itaque agni, hædi, et vituli, et equuli, et ſuculi, ſtatim naturali jure dominii fructuarii ſunt. Partus vero ancillæ in fructu non eſt: itaque ad dominum proprietatis pertinet. Abſurdum enim videbatur, hominem in fructu eſſe: cum omnes fructus rerum natura gratia hominis comparaverit.

§ 37. *In eſtimating the product of animals, we not only reckon milk, ſkins, and wool, but alſo their young; and therefore lambs, kids, calves, colts, and pigs, appertain by natural right to the uſufructuary; but the offspring of a female ſlave is not to be included within this product; and can belong to him only, in whom the property of ſuch female ſlave is veſted: for it ſeemed abſurd to think, that man, for whom nature hath framed all things, ſhould be enumerated among the productions of the brute creation.*

De officio fructuarii.

§ XXXVIII. Sed, ſi gregis uſumfructum quis habeat, in locum demortuorum capitum ex fœtu fructuarius ſubmittere debet (ut et Juliano viſum eſt) et in vinearum demortuarum vel arborum locum alias debet ſubſtituere. Recte enim colere, et quaſi bonus paterfamilias uti, debet.

§ 38. *He, who hath the uſufruct of a flock, ought, (according to the opinion of* Julian) *to preſerve the original number of his ſheep intire, by ſupplying the place of thoſe, which die, out of the produce of the flock. And the duty of a uſufructuary is the ſame in regard to other things; for he ought to ſupply the place of dead vines, or trees, by ſubſtituting others in their ſtead; and to act in every reſpect, like a good huſbandman.*

De inventione theſauri.

§ XXXIX. Theſauros, quos quis in loco ſuo invenerit, divus Adrianus, naturalem æquitatem ſequutus, ei conceſſit, qui eos invenerit. Idemque ſtatuit, ſi quis in ſacro aut religioſo loco fortuito caſu invenerit. At ſi

quis in alieno loco, non data ad hoc opera, ſed fortuito invenerit, dimidium domino ſoli conceſſit, et dimidium inventori. Et convenienter, ſi quis in Cæſaris loco invenerit, dimidium inventoris, et dimidium eſſe Cæſaris, ſtatuit. Cui conveniens eſt, ut ſi quis in fiſcali loco vel publico vel civitatis invenerit, dimidium ipſius eſſe debeat, et dimidium fiſci, vel civitatis.

§ 39. *It hath been allowed by the emperor* Adrian, *in perſuance of natural equity, that any treaſure, which a man finds in his own lands, ſhall become the property of the finder; and that whatever is caſually found, in a ſacred or religious place, ſhall alſo become the property of him, who finds it. But, if a perſon, not making it his buſineſs to ſearch, ſhould fortuitouſly find a treaſure in the ground of another, the emperor hath granted the half of ſuch treaſure to the proprietor of the ſoil, and half to the finder. He hath in like manner ordained, that, if any thing is found within the imperial demeſnes, half ſhall appertain to the finder and half to the emperor: and, ſimilar to this, if a man finds any valuable thing in a place or diſtrict belonging to the treaſury, the public, or the city, the ſame emperor hath decreed, that half ſhall appertain to the finder, and half to the treaſury, the public, or the city, to which the place or diſtrict belongs.*

Theſauros.] Treaſures naturally belong to the finder; that is, to him, who moves them from the place where they are, and ſecures them; yet nothing forbids but that the laws and cuſtoms of any country may ordain otherwiſe. *Plato* was deſirous, that notice ſhould be given to the magiſtrates, and that the oracle ſhould be conſulted: and *Apollonius*, looking upon a treaſure found as a particular bleſſing from heaven, adjudged it to the *beſt man*. The *Hebrews* gave it to the owner of the ground where it was found, as may be gathered from *Chriſt*'s parable, *Matt.* xiii. 44. and, that the *Syrians* did the ſame, we may infer from a ſtory in *Philoſtratus*, lib. vi. cap. 16. The laws of the *Roman* emperors are very various upon this ſubject, as appears partly from their conſtitutions, and partly from the hiſtories of *Lampridius*, *Zonarus*, and *Cedrenus*. The *Germans* awarded treaſures found, and indeed all other ἀδεσπότα (*i. e.* things without an owner) to their prince; which is now grown ſo common, that it may paſs for the law of nations; for it is now obſerved in *Germany*, *France*, *Spain*, *Denmark*, and *England*; where treaſure-trove is underſtood to be any gold or ſilver, in coin, plate or bullion, which hath been of antient time hidden; and whereſoever it is found, if no perſon can prove it to be his property, it belongs to the king, or his grantèe. A concealment of treaſure-trove is now only puniſhed by fine and impriſonment; but it appears from *Glanvill* and *Bracton*, that *occultatio theſauri inventi fraudulenſa* was formerly an offenſe puniſhable with death. 3. *Co. inſt.* 132, 133. *Cuſtum. de Norm. cap.* 18. *Grot. de jur. bell. et pac. l.* 2. *cap.* 8. *ſect.* 7.

De traditione. 1. *Regula ejuſque ratio.*

§ XL. Per traditionem quoque jure naturali res nobis acquiruntur: nihil enim tam conveniens eſt naturali æquitati, quam voluntatem domini, volentis rem ſuam in alium transferre, ratam haberi: et ideo, cujuſcunque generis ſit corporalis res, tradi poteſt, et à domino tradita alienatur: itaque ſtipendiaria quoque et tributaria prædia eodem modo alienantur. Vocantur autem ſtipendiaria et tributaria prædia, quæ in provinciis ſunt: inter quæ nec non et Italica prædia, ex noſtra conſtitutione, nulla eſt differentia: ſed ſiquidem ex cauſa donationis, aut dotis, aut qualibet alia ex cauſa, tradantur, ſine dubio transferuntur.

§ 40. *Things are alſo acquired (according to the law of nature) by tradition or livery; for nothing is more conformable to natural equity, than to confirm the will of him, who is deſirous to transfer his property into the hands of another: and therefore cor-*

corporeal things, of whatever kind they are, may be delivered; and, when delivered by the true owner, are abſolutely aliened. Stipendiary *and* tributary *poſſeſſions (and thoſe, which are ſituated in the provinces, are ſo called) may alſo be aliened in the ſame manner: for between theſe, and the* Italian *eſtates, we have now taken away all diſtinction, by our imperial ordinance: ſo that, on* account *of a donation, a marriage-portion, or any other juſt cauſe,* ſtipendiary *and* tributary *poſſeſſions may undoubtedly be transfered by livery.*

Ex noſtra conſtitutione.] *vid. Cod. 7. t. 31. l. un.* de uſucapione transformanda, et de ſublata differentia rerum mancipi et nec mancipi. *ann. Ch. 531.*

2. *Limitatio.*

§ XLI. Venditæ vero res et traditæ non aliter emptori acquiruntur, quam ſi is venditori pretium ſolverit, vel alio modo ei ſatisfecerit; veluti ex promiſſore aut pignore dato: quod quamquam cavetur lege duodecim tabularum, tamen recte dicitur et jure gentium, id eſt, jure naturali, id effici. Sed, ſi is, qui vendidit, fidem emptoris ſequutus fuerit, dicendum eſt, ſtatim rem emptoris fieri.

§ 41. *Things, altho' ſold and delivered, are yet not acquired by the buyer, until he hath either paid the ſeller for them, or ſatisfied him in ſome other manner; as by a bondſman or pledge. And, altho' this is ſo ordained by a law of the twelve tables, yet the ſame rule of juſtice is rightly ſaid to ariſe from the law of nations; that is, from the law of nature. But, if the ſeller ſhall have given credit to the buyer, we muſt affirm, that the things will then become inſtantly the property of the latter.*

3. *Ampliatio.*

§ XLII. Nihil autem intereſt, utrum ipſe dominus tradat alicui rem ſuam, an voluntate ejus alius, cui ejus rei poſſeſſio permiſſa ſit. Qua ratione, ſi cui libera univerſorum negotiorum adminiſtratio permiſſa fuerit à domino, iſque ex his negotiis rem vendiderit et tradiderit, faciet eam accipientis.

§ 42. *It makes no difference, whether the owner of a particular thing delivered it himſelf, or whether another, to whom the care and poſſeſſion of it was intruſted, ſhall have delivered it with the owner's conſent. And, for this reaſon, if the free and univerſal adminiſtration of all buſineſs is commited by a proprietor to any certain perſon, and the committèe, by virtue of his commiſſion, ſhall ſell and deliver any goods, then will ſuch goods become the property of the receiver.*

De quaſi traditione. Si traditio ex alia cauſa præceſſerit.

§ XLIII. Interdum etiam ſine traditione nuda voluntas domini ſufficit ad rem transferendam; veluti ſi rem, quam tibi aliquis commodaverit, aut locaverit, aut apud te depoſuerit, poſtea aut vendiderit tibi, aut donaverit, aut dotis nomine dederit: quamvis enim ex ea cauſa tibi eam non tradiderit, eo tamen ipſo, quod patitur tuam eſſe, ſtatim tibi acquiritur proprietas, perinde ac ſi eo nomine tibi tradita fuiſſet.

§ 43. *In ſome caſes, even without delivery, the mere conſent of the proprietor is ſufficient to transfer property: as, when it happens, that a perſon hath lent any thing to you, let it, or depoſited it in your poſſeſſion, and hath afterwards ſold it to you, made a donation of it, or given it to you, as a marriage portion: for altho' he ſhall not have delivered it, for any of theſe laſt mentioned purpoſes, yet, as ſoon as it is by conſent reputed to be yours, you have inſtantly acquired the property of it, and that as fully, as if it had actually been delivered to you, as a thing ſold, a donation, or a marriage portion.*

Acquiritur proprietas.] This is called *fictio brevis manus*; which takes place, when goods are put into the poſſeſſion of ſome perſon by way of depoſit or loan, and are afterwards given or ſold to the ſame perſon, he being already the poſſeſſor. *ff.* 23. *t.* 3. *l.* 43.

De traditione clavium.

§ XLIV. Item, ſi quis merces in horreo depoſitas vendiderit, ſimul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem.

§ 44. *Alſo if a perſon hath ſold any ſpecies of merchandiſe, depoſited in a ſtore-houſe, ſuch perſon is underſtood to have transfered the property of his merchandiſe, as ſoon as he hath delivered the keys of the ſtore-houſe to the buyer.*

De miſſilibus.

§ XLV. Hoc amplius, interdum et in incertam perſonam collata voluntas domini transfert rei proprietatem: ut ecce, prætores et conſules, cum miſſilia jactant in vulgus, ignorant quid eorum quiſque ſit excepturus: et tamen, quia volunt, quod quiſque acceperit, ejus eſſe, ſtatim eum dominum efficiunt.

§ 45. *It alſo ſometimes happens, that the property of a thing is transfered, by the maſter of it, to an incertain perſon: thus for inſtance, when the prætors and conſuls caſt their* miſſilia, *or liberalities, among the people, they know not what any particular man will receive, and yet, becauſe it is their will and deſire, that what every man then receives ſhall be his own, it therefore inſtantly becomes his property.*

De habitis pro derelicto.

§ XLVI. Qua ratione verius eſſe videtur, ſi rem pro derelicto à domino habitam occupaverit quis, ſtatim eum dominum effici. Pro derelicto autem habetur, quod dominus ea mente abjecerit, ut id in numero rerum ſuarum eſſe nolit: ideoque ſtatim dominus ejus eſſe deſinit.

§ 46. *By a parity of reaſon it appears true, that a thing, which hath been made a* derelict *by the owner, will become the property of the firſt occupant. And whatever hath either been thrown away, or abandoned by the owner, to the intent, that it might never more be reckoned among his poſſeſſions, is properly accounted a* derelict: *and therefore ceaſes to be his property.*

Pro derelicto.] What the *Romans* called a *derelict* the *Engliſh* lawyers call a *waife:* and this was formerly looked upon as the natural right of the finder, but it now belongs to the prince. A *waife*, ſtrictly ſo called, is a perſonal or moveable chattel, which having been feloniouſly taken, and then forſaken thro' fear, has no owner to claim it; and therefore, if any ſuch thing is found, it becomes either the property of the king, or of the lord, to whom the king hath granted

granted it; but it muſt be reſtored, if the true and proper owner claims it within a year and a day. In the ſame manner, all beaſts, which ſtray, are regarded as *dereliƈts*, and were by our antient writers included under the word *waives*; but they are now ſpecified more particularly by the term *eſtrays*, which is rendered in *Latin Extraburæ*; becauſe ſuch cattle break forth and wander againſt the will of their owner; and, if they are not claimed within a year and a day, they eſcheat to the king or the lord of the manor, where they were taken, if they have been publicly proclaimed in the neighbouring markets. *Cow.* inſt. h. t. 5 *Co. rep.* 109. *Wood's* inſt. 213.

De jaƈtis in mare levandæ navis cauſa. Item de his, quæ de rheda currente cadunt.

§ XLVII. Alia ſane cauſa eſt earum rerum, quæ in tempeſtate levandæ navis cauſa ejiciuntur: hæ enim dominorum permanent: quia palam eſt, eas non eo animo ejici, quod quis eas habere nolit, ſed quo magis cum ipſa navi maris periculum effugiat. Qua de cauſa, ſi quis eas fluƈtibus expulſas, vel etiam in ipſo mari naƈtus, lucrandi animo abſtulerit, furtum committit. Nec longe videntur diſcedere ab his, quæ de rheda currente, non intelligentibus dominis, cadunt.

§ 47. *But the law is otherwiſe in reſpeƈt to thoſe things, which are thrown overboard in a ſtorm, for the ſake of lightening a ſhip; for ſuch things remain the property of the owners, inaſmuch as it is evident, that they were not thrown away, through diſlike, but that each perſon in the ſhip might avoid the dangers of the ſea. And, upon this account, whoever hath, with a lucrative intention, taken away ſuch goods, altho' found even upon the high ſea, he is guilty of theft. And, with theſe, thoſe goods may be ranked, which have droped from a carriage in motion, without the knowledge of the owner.*

Furtum committit.] None of thoſe goods, which are called *Jetſam*, (from being caſt into the ſea while the ſhip is in danger) or thoſe called *Flotſam* (from floating after ſhipwreck) or thoſe called *Ligan*, (that is, goods ſunk in the ſea, but tied to a buoy, that they may be found) are to be eſteemed wreck, ſo long as they remain in the ſea. And by 3 *Edw.* 1. *cap.* 4. it is enaƈted—*that if a man, cat, or dog, eſcape alive out of the ſhip, whereby the owner of the goods may be known, neither the veſſel, nor any thing therein, ſhall be adjudged wreck; but ſhall be reſtored to the owner, if he claims within a year and a day.* A man, cat, or dog, are only put for examples; but all other living things are to be underſtood; and if the owner of the ſhip ſhould die within the year and a day, his executors or adminiſtrators may make proof. 2. *Co. inſt.* 167, 168. *Wood's inſt.* 214. If the goods are taken away by wrong-doers, the owner may have his action; and, if the wrong-doers are unknown, he may have a commiſſion of oyer and terminer, to inquire what perſons commited the treſpaſs, and make reſtitution.

TITULUS SECUNDUS.

De rebus corporalibus et incorporalibus.

Secunda rerum diviſio.

QUÆDAM præterea res corporales ſunt, quædam incorporales. Corporales hæ ſunt, quæ ſui natura tangi poſſunt; veluti fundus, homo, veſtis, aurum, argentum, et denique aliæ res innumerabiles. Incorporales

porales autem ſunt, quæ tangi non poſſunt: qualia ſunt ea, quæ in jure conſiſtunt, ſicut hæreditas, uſusfructus, uſus, et obligationes, quoquo modo contractæ. Nec ad rem pertinet, quod in hæreditate res corporales continentur: nam et fructus, qui ex fundo percipiuntur, corporales ſunt: et id, quod ex aliqua obligatione nobis debetur, plerumque corporale eſt, veluti fundus, homo, pecunia: nam ipſum jus hæreditatis, et ipſum jus utendi fruendi, et ipſum jus obligationis incorporale eſt. Eodem numero ſunt et jura prædiorum urbanorum et ruſticorum, quæ etiam ſervitutes vocantur.

Things may alſo be farther divided into corporeal *and* incorporeal. *Things* corporeal *are thoſe, which may be touched; as, for example, lands, ſlaves, veſtments, gold, ſilver, and others innumerable. Things* incorporeal *are thoſe, which are not ſubject to the touch, but conſiſt in rights and privileges; as inheritances, uſufructs, uſes, and all obligations, in what manner ſoever they are contracted: nor is it an objection of any conſequence to urge, that things* corporeal *are contained in an inheritance: for fruits, gathered from the earth, are* corporeal; *and that alſo is generally* corporeal, *which is due to us upon an obligation; as a field, a ſlave, or money: but it muſt be obſerved, that we here mean only the* right *to an inheritance, the* right *of uſing and injoying any particular thing, and the* right *of an obligation; all which* rights *are undoubtedly* incorporeal. *And to theſe may be added the* rights, *or rather qualities, of rural and city eſtates, which are alſo termed* ſervices.

Ruſticorum prædiorum jura.] Predial or real ſervices are the rights, which one eſtate owes to another. And, as eſtates are either rural inheritances, as lands, barns, ſtables, &c. or city-inheritances, as houſes for habitation, predial ſervices are ſubdivided into *ruſticas* et *urbanas*, rural and city-ſervices. Perſonal ſervices are thoſe, which are due from a thing to a perſon. By ſome theſe are called mixed; and they are many and various, without any certain name, except three, which are termed, uſufruct, uſe, and habitation. *Wood's inſt. law. p.* 145.

TITULUS TERTIUS.

De ſervitutibus ruſticorum et urbanorum prædiorum.

D. viii. T. 1. et 2. C. iii. T. 34.

De ſervitutibus ruſticis.

RUSTICORUM prædiorum jura ſunt hæc: iter, actus, via, aquæductus. Iter eſt jus eundi, ambulandi hominis, non etiam jumentum agendi vel vehiculum. Actus eſt jus agendi jumentum vel vehiculum. Itaque, qui habet iter, actum non habet: ſed, qui actum habet, et iter habet, eoque uti poteſt etiam ſine jumento. Via eſt jus eundi, et agendi, et ambulandi: nam iter et actum via in ſe continet. Aquæductus eſt jus aquæ ducendæ per fundum alienum.

The

The rights or ſervices of rural eſtates are theſe; *a* path, *a* road, *an* highway, *and an* aqueduct *or free paſſage for water. A* path *denotes the right of paſſing and repaſſing on foot over another man's ground, but not of driving cattle or a carriage over it. A* road *implies the liberty of driving either cattle or carriages: and therefore he, who hath a* path, *hath not a* road: *but he, who hath a* road, *hath inclusively a* path; *for he may uſe ſuch* road, *when he doth not drive cattle. An* highway *is a ſervice, which imports the right of paſſing, driving cattle, &c. and includes in it both a* path *and a* road: *and an* aqueduct *is a ſervice, by which one man may have the right of a free paſſage or conduit for water, through the grounds of another.*

De ſervitutibus urbanis.

§ I. Prædiorum urbanorum ſervitutes ſunt hæ, quæ ædificiis inhærent; ideo urbanorum prædiorum dictæ, quoniam ædificia omnia urbana prædia appellamus, etſi in villa ædificata ſunt. Item urbanorum prædiorum ſervitutes ſunt hæ, ut vicinus onera vicini ſuſtineat: ut in parietem ejus liceat vicino tignum immittere: ut ſtillicidium, vel flumen recipiat quis in ædes ſuas, vel in aream, vel in cloacam, vel non recipiat: et ne altius quis tollat ædes ſuas, ne luminibus vicini officiat.

§ 1. *The ſervices of city-eſtates and inheritances are thoſe, which appertain and adhere to buildings: and they are therefore called the ſervices of city-eſtates, becauſe we call all edifices city-eſtates, altho' they are built upon farms or in villages. It is required by city-ſervices, that neighbours ſhould bear the burdens of neighbours; and, by ſuch ſervices, one neighbour may be permitted to place a beam upon the wall of another;—— may be compelled to receive the droppings and currents from the gutter-pipes of another man's houſe, upon his own houſe, area, or ſewer; or may be exempted from receiving them;—— or may be reſtrained from raiſing his houſe in height, leſt he ſhould darken the habitation of his neighbour.*

Etſi in villa.] In the *Roman* law all houſes and buildings, whether in town or country, are called *prædia urbana:* and all lands, whether meadows, arable lands, or vineyards, are denominated *prædia ruſtica.*

Urbana prædia omnia ædificia accipimus, non ſolum ea, quæ ſunt in oppidis, ſed etſi forte ſtabula vel alia meritoria in villis et in vicis, vel ſi prætoria voluptati tantum deſervientia: quia urbanum prædium non locus facit ſed materia. ff. 50. t. 16. *l.* 198.

De reliquis ſervitutibus ruſticis.

§ II. Inter ruſticorum prædiorum ſervitutes quidam computari recte putant aquæ hauſtum, pecoris ad aquam appulſum, jus paſcendi, calcis coquendæ, arenæ fodiendæ.

§ 2. *Some are with reaſon of opinion, that, among rural ſervices, we ought to reckon thoſe, by which we obtain the right of drawing water, watering and feeding cattle, making lime, digging ſand,* &c. *in the ground of another.*

Quidam recte putant.] Theſe ſervices are ſometimes predial, and ſometimes perſonal, according to the cauſe and reaſon of their conſtitution.

Perſonales, ſi non in uſum vicini prædii, ſed perſonæ, conſtituuntur: prædiales, ſi vicino prædio inſerviunt. Hein.

Qui ſervitutem debere vel acquirere poſſunt.

§ III. Ideo autem hæ ſervitutes prædiorum appellantur, quoniam ſine prædiis conſiſtere non poſſunt. Nemo enim poteſt ſervitutem acquirere urbani

bani vel ruſtici prædii, niſi qui habet prædium: nec quiſquam debere, niſi qui prædium habet.

§ 3. *All theſe ſervices are called the ſervices of eſtates or inheritances; becauſe they can not be conſtituted without an inheritance to ſupport them; for no man can either owe, or acquire, a rural or city-ſervice, if he poſſeſſes neither houſe nor lands.*

Quibus modis ſervitus conſtituitur.

§ IV. Si quis velit vicino aliquod jus conſtituere, pactionibus atque ſtipulationibus id efficere debet. Poteſt etiam quis teſtamento hæredem ſuum damnare, ne altius tollat ædes ſuas, ne luminibus vicini officiat; vel ut patiatur eum tignum in parietem ſuum immittere, ſtillicidiumve adverſus eum habere; vel ut patiatur eum per fundum ire, agere, aquamve ex eo ducere.

§ 4. *When ever any one is willing to demiſe the right of a ſervice to another, he may do it by contract and ſtipulation. A man may alſo by teſtament prohibit his heir from heightening his houſe, leſt he ſhould obſtruct the view of his neighbour: or may oblige his heir to permit the rafter of another man's houſe to be laid upon his wall: or to receive upon his own houſe the droppings of anothers: or to ſuffer any perſon to walk, drive cattle, or draw water in his grounds.*

TITULUS QUARTUS.

De Uſufructu.

D. vii. T. 1. C. iii. T. 33.

Definitio uſusfructus.

USUSFRUCTUS eſt jus alienis rebus utendi fruendi, ſalva rerum ſubſtantia. Eſt autem jus in corpore, quo ſublato et ipſum tolli neceſſe eſt.

An uſufruct *is the right of uſing and enjoying, without diminution, the things, which are the property of another. But altho' an* uſufruct *is a right, and therefore incorporeal, yet, as it appertains always to a ſubſtance, it neceſſarily follows, that, if the ſubſtance periſhes, the* uſufruct *muſt ceaſe.*

Quibus modis conſtituitur.

§ I. Uſusfructus à proprietate ſeparationem recipit, idque pluribus modis accidit: ut ecce, ſi quis uſumfructum alicui legaverit: nam hæres nudam habet proprietatem, legatarius vero uſumfructum. Et contra, ſi fundum legaverit deducto uſufructu, legatarius nudam habet proprietatem, hæres vero uſumfructum. Item alii uſumfructum, alii deducto eo fundum legare poteſt. Sine teſtamento vero ſi quis velit uſumfructum alii con-

conſtituere, pactionibus et ſtipulationibus id efficere debet. Ne tamen in univerſum inutiles eſſent proprietates, ſemper abſcedente uſufructu, placuit certis modis extingui uſumfructum, et ad proprietatem reverti.

§ 1. *The* uſufruct *of things is frequently ſeparated from the property; and thi happens by various means: it happens, for inſtance, when the* uſufruct *is bequeathed by teſtament: for the heir hath then only the nude property veſted in him, whileſt the legatèe poſſeſſes the* uſufruct—— *or, on the contrary, it happens, when a teſtator hath bequeathed his lands without the* uſufruct; *for then the legatary hath only the nude property, whileſt the heir enjoys the profits: for the* uſufruct *may be bequeathed to one man, and the lands, without the* uſufruct, *to another. Yet, if any man would conſtitute an* uſufruct *otherwiſe, than by teſtament, he muſt do it by paction and ſtipulation. But leſt the property of lands ſhould be rendered wholly unbeneficial by deducting the* uſufruct *for ever, it was thought convenient, that the* uſufruct *ſhould by certain means become extinguiſhed, and revert to the property.*

Uſusfructus a proprietate.] In the laws of *England* there is no mention of ſuch uſufructs, which were among the *Romans*; but they may undoubtedly be created among us by agreement or by teſtament. An eſtate for life, for years, or at the will of the lord, &c. are almoſt of the ſame nature. *Wood's imp. law.* 149.

Quibus in rebus conſtituitur.

§ II. Conſtituitur autem uſusfructus non tantum in fundo et ædibus, verum etiam in ſervis, et jumentis, et cæteris rebus: exceptis iis, quæ ipſo uſu conſumuntur. Nam hæ res neque naturali ratione, neque civili, recipiunt uſumfructum: quo in numero ſunt vinum, oleum, frumentum, veſtimenta: quibus proxima eſt pecunia numerata: namque ipſo uſu, aſſidua permutatione, quodammodo extinguitur. Sed utilitatis cauſa Senatus cenſuit, poſſe etiam earum rerum uſumfructum conſtitui, ut tamen eo nomine hæredi utiliter caveatur. Itaque, ſi pecuniæ uſusfructus legatus ſit, ita datur legatario, ut ejus fiat, et legatarius ſatiſdet hæredi de tanta pecunia reſtituenda, ſi morietur, aut capite minuetur. Cæteræ quoque res ita traduntur legatario, ut ejus fiant: ſed æſtimatis his ſatiſdatur, ut, ſi moriatur aut capite minuatur, tanta pecunia reſtituatur, quanti hæ fuerint æſtimatæ. Ergo Senatus non fecit quidem earum rerum uſumfructum, (nec enim poterat) ſed per cautionem quaſi uſumfructum conſtituit.

§ 2. *The* uſufruct *not only of lands and houſes is grantable, but alſo the* uſufruct *of ſlaves, cattle, and other things; except thoſe, of which the nature is ſuch, that they may be conſumed by uſing; for the* uſufruct *of ſuch things is neither grantable by civil policy, nor natural reaſon; and among theſe may be reckoned wine, oil, cloaths,* &c. *And money alſo is almoſt of the ſame nature: for by conſtant uſe, and the frequent change of owners, it in a manner becomes extinguiſhed. But the ſenate, thro' a motive of public utility, hath ordained, that the* uſufruct *of theſe things may be conſtituted, if a ſufficient caution is given upon this account to the heir: and therefore, if the* uſufruct *of money is bequeathed, the money is ſo given to the legatary, as to make it inſtantly his own: but then the legatary, leſt he ſhould die, or ſuffer diminution, is obliged to give ſecurity to the heir for the repayment of a like ſum. Other things alſo, which are in their nature liable to conſumption in uſing, when the* uſufruct *of them is bequeathed, are ſo delivered to the legatary, as to become wholly his*

property; but in this caſe, after an exact valuation hath been made, caution muſt be given to the heir for the payment of a ſum, equal to ſuch valuation, either at the death of the legatary, or if it happens, that he ſhould ſuffer diminution. It is not therefore to be underſtood, that the ſenate hath created an uſufruct *of theſe things, which is impoſſible; but that the ſenate hath conſtituted a* quaſi-uſufruct *by means of a caution.*

Senatus cenſuit.] *vid. ff. 7. t. 5. ll. 1, 2. de uſufructu earum rerum, quæ uſu conſumuntur.* Ulp.

Quibus modis finitur.

§ III. Finitur autem uſusfructus morte uſufructuarii, et duabus capitis diminutionibus, maxima et media, & non utendo per modum et tempus; quæ omnia noſtra ſtatuit conſtitutio. Item finitur uſusfructus, ſi domino proprietatis ab uſufructuario cedatur, (nam cedendo extraneo nihil agitur) vel ex contrario, ſi uſufructuarius proprietatem rei acquiſiverit: quæ res conſolidatio appellatur. Eo amplius conſtat, ſi ædes incendio comſumptæ fuerint, vel etiam terræ motu, vel vitio ſuo corruerint, extingui uſumfructum, et ne areæ quidem uſumfructum deberi.

§ 3. *The* uſufruct *of a thing determines by the death of the uſufructuary; and by two of the three diminutions; namely, the greateſt and the middle diminution, or change of ſtate; and alſo by not being uſed, according to the manner, and during the time preſcribed: all which things are ſet forth in our conſtitution. The* uſufruct *of a thing alſo determines, if the uſufructuary hath ſurrendered it to the lord of the property; but a ceſſion of it to a ſtranger does not work a ſurrender to the proprietor: or, on the contrary, an* uſufruct *determines, if the uſufructuary hath acquired the property of it: and this is called conſolidation. And it is certain, if an houſe hath been conſumed by fire, or hath fallen by means of an earthquake, or thro' decay, that then the* uſufruct *of ſuch houſe is wholly deſtroyed; and that no* uſufruct *of the area or ground of it can afterwards become due to the uſufructuary.*

Statuit conſtitutio.] *vid. Cod. 3. t. 23. l. 16.*

Si finitus ſit.

§ IV. Cum autem finitus fuerit totus uſusfructus, revertitur ſcilicet ad proprietatem, et, ex eo tempore, nudæ proprietatis dominus incipit plenam in re habere poteſtatem.

§ 4. *When the whole* uſufruct *of a thing is determined, it then reverts to the property; and, from that inſtant of time, the owner of the nude property commences to have a full and intire power over the thing.*

TITULUS QUINTUS.

De uſu et habitatione.

D. vii. T. 8. C. iii. T. 33.

Communia de uſufructu et uſu.

IISDEM illis modis, quibus uſusfructus conſtituitur, etiam nudus uſus conſtitui ſolet: iiſdem illis modis finitur, quibus et uſusfructus deſinit.

The uſufruct, *and the nude* uſe *of a thing, are both of them conſtituted, and both determined by the ſame means.*

Quid interſit inter uſumfructum et uſum fundi.

§ I. Minus autem juris eſt in uſu quam in uſufructu: nam is, qui fundi nudum habet uſum, nihil ulterius habere intelligitur, quam ut oleribus, pomis, floribus, fœno, ſtramentis, et lignis, ad uſum quotidianum utatur: inque eo fundo hactenus ei morari licet, ut neque domino fundi moleſtus ſit, neque iis, per quos opera ruſtica fiunt, impedimento: nec ulli alii jus, quod habet, aut locare, aut vendere, aut gratis concedere, poteſt: cum is, qui uſumfructum habet, poſſit hæc omnia facere.

§ 1. *There is leſs benefit and emolument in the* uſe *of a thing, than in the* uſufruct: *for he, who hath but ſimply the uſe of lands, is underſtood to have nothing more, than the liberty of uſing ſuch a quantity of herbs, fruit, flowers, hay, ſtraw, and wood, which may be ſufficient to ſupply his daily exigences: and he is permited only to be commorant upon the land, on condition, that he neither becomes troubleſome to the owner, nor impedes the workmen in their country-labors. And an uſuary, having but a mere uſe, can neither let, ſell, or give away his right to another, altho' it is in the power of an uſufructuary to convey his* uſufruct, *either by leaſe, ſale, or donation.*

Minus autem.] An *Uſe*, by the laws of *England*, is of as great an extent, as an uſufruct by the *Roman* law. And by 27. *H.* 8. *He, who hath the uſe of land, is deemed to have the land itſelf.* But as to ſuch uſes and rights of habitation, which were among the *Romans*, tho' our laws have not treated of them in any particular manner, yet they may certainly be granted and acquired by ſpecial covenants and agreements, as was ſaid of uſufruct. *Uſus apud nos æque late extenditur, atque uſusfructus apud authores juris civilis; ſed non video, cur idem jus tam de uſu, ut illi eum intelligunt, quam de habitatione, apud nos non teneat, quod olim inter* Romanos *tenebat.* Cowel, h. t. Wood's imp. Law. 151.

Ædium uſus.

§ II. Item is, qui ædium uſum habet, hactenus jus habere intelligitur, ut ipſe tantum inhabitet; nec hoc jus ad alium transferre poteſt: et vix receptum eſſe videtur, ut hoſpitem ei recipere liceat, et cum uxore liberiſque ſuis, item libertis, nec non perſonis aliis liberis, quibus non minus,

quam ſervis utitur, habitandi jus habeat. Et convenienter, ſi ad mulierem uſus ædium pertineat, cum marito ei habitare liceat.

§ 2. *He, who hath but the mere uſe of an houſe, is underſtood to have a right in it ſo far only, as to inable him to inhabit it himſelf: for he hath no power to transfer this right to another; and it is hardly thought allowable, that he ſhould receive a gueſt or a lodger. But the uſuary, notwithſtanding what has been ſaid, hath a right to inhabit the houſe together with his wife, his children, and his freed-men; and alſo with ſuch other free perſons, who are in the quality of ſervants. And, agreeably to this, if the uſe of an houſe appertains to a woman, ſhe alſo hath the liberty of living in it with her huſband, and her dependents.*

Nudum habet uſum.] An uſufruct is a right of enjoying all the fruits and revenues, which the eſtate, ſubject to it, is capable of producing; but an uſe conſiſts only in a right to take out of the fruits of the ground what is neceſſary for the perſon, who has the uſe, or what is ſettled by his title; and the ſurplus belongs to the proprietor of the eſtate: thus thoſe, who have the right of uſe in a foreſt or copice, can only take what is neceſſary for their uſe, or is regulated by their title. And he, who has the uſe of any other ground, can only take out of it what ſhall be neceſſary to ſupply the occaſions he ſhall have for thoſe kinds of fruits, which the grounds produce: or the uſe may even be reſtrained to certain kinds of fruits, or revenues, without extending it to others. Thus we ſee in the *Roman* law, that he, who had only the ſimple uſe of a piece of ground, had no ſhare of the corn or oil, which grew in it; and that he, who had the uſe of a flock of ſheep, was reſtrained only to make uſe of them for dunging his grounds, and had no ſhare either in the wool or lambs: and even of the milk, it is ſaid in ſome places, that the uſuary could take but a very ſmall portion; and in others, that he had no right to any of it. *ff. 7. t. 8. l. 12. Domat. lib. 1. t. 2. ſect. 2.*

De ſervi vel jumenti uſu.

§ III. Item is, ad quem ſervi uſus pertinet, ipſe tantum opera atque miniſterio ejus uti poteſt: ad alium vero nullo modo jus ſuum transferre ei conceſſum eſt. Idem ſcilicet juris eſt et in jumento.

§ 3. *He alſo, who hath ſimply the uſe of a ſlave, can benefit* himſelf *only by the labor and ſervice of ſuch ſlave: for it is by no means in the power of the uſuary to transfer his right over to another. And the ſame law prevails in regard to beaſts of burden.*

De pecorum uſu.

§ IV. Sed et, ſi pecorum vel ovium uſus legatus ſit, neque lacte, neque agnis, neque lana, utetur uſuarius: quia ea in fructu ſunt. Plane ad ſtercorandum agrum ſuum pecoribus uti poteſt.

§ 4. *If the uſe of cattle is left by teſtament; as, for example, the uſe of ſheep; yet the uſuary can neither uſe the milk, the lambs, nor the wool; for theſe of right belong to the* uſufruct. *But the uſuary may undoubtedly imploy the ſheep, in ſoiling and improving his lands.*

De habitatione.

§ V. Sed, ſi cui habitatio legata, ſive aliquo modo conſtituta ſit, neque uſus videtur, neque uſusfructus, ſed quaſi proprium aliquod jus: quanquam habitationem habentibus, propter rerum utilitatem, ſecundum Marcelli ſententiam noſtra deciſione promulgata, permiſimus non ſolum in ea degere, ſed etiam aliis locare.

§ 5. *An habitation, whether given by teſtament, or conſtituted by any other means, appears to be neither an* uſe, *nor an* uſufruct, *but ſeems to be rather a* particular right. *And, for the public utility and in conformity to the opinion of* Marcellus, *we have permited by our deciſion, that he, who hath an habitation, may not only live in it, but alſo let it to another.*

Noſtra deciſione.] Whoever hath a right of habitation in a houſe, or in a part of it, may aſſign over and let out his right to another, unleſs the inſtrument, from which he derives his title, bears ſome condition to the contrary: and the right of habitation, as well as that of uſe, if ſimply given, continues during the life of him, who poſſeſſes it. *Cod.* 3. *t.* 33. *l.* 13. *de uſufructu et habitatione.* *ff.* 7. *t.* 8. *l.* 10. *ſect.* 3.

Tranſitio.

§ VI. Hæc de ſervitutibus, et uſufructu, et uſu, et habitatione, dixiſſe ſufficiat. De hæreditatibus autem et obligationibus ſuis locis proponemus. Expoſuimus ſummatim, quibus modis jure gentium res acquiruntur: modo videamus, quibus modis legitimo et civili jure acquiruntur.

§ 6. *What we have already delivered, concerning real ſervices, uſufructs, uſes, and habitations, may at this time be ſufficient. Concerning inheritances, and obligations, we will treat in their proper places. We have already explained ſummarily by what means things are acquired, according to the law of nations; let us now therefore examine, by what means they are acquired according to the civil law.*

TITULUS SEXTUS.

De uſucapionibus et longi temporis preſcriptionibus.

D. xli. T. 3. C. vii. T. 31, et 33.

Præcipua uſucapionis requiſita. 1. *Bona fides.* 2. *Poſſeſſio per tempus definitum continuata.* 3. *Juſtus titulus.*

JURE civili conſtitutum fuerat, ut, qui bona fide ab eo, qui dominus non erat, cum crederet eum dominum eſſe, rem emerit, vel ex donatione, aliave quavis juſta cauſa acceperit, is eam rem, ſi mobilis erat, anno ubique uno, ſi immobilis, biennio tantum in Italico ſolo, uſucaperet: ne rerum dominia in incerto eſſent. Et cum hoc placitum erat putantibus antiquioribus, dominis ſufficere ad inquirendas res ſuas præfata tempora, nobis melior ſententia reſedit, ne domini maturius ſuis rebus defraudentur neque certo loco beneficium hoc concludatur. Et ideo conſtitutionem ſuper hoc promulgavimus, qua cautum eſt, ut res quidem mobiles per triennium; immobiles vero per longi temporis poſſeſſionem (id eſt, inter præſentes decennio, inter abſentes viginti annis) uſucapiantur. Et his modis, non..

non ſolum in Italia, ſed etiam in omni terra, quæ noſtro imperio gubernatur, dominia rerum, juſta cauſa poſſeſſionis præcedente, acquirantur.

It was antiently decreed by the civil law, that he, who by means of purchaſe, donation, or any other juſt title, had obtained a thing from another, whom he thought to be the true owner of it, (altho' in reality he was not) and, if it was moveable, had poſſeſſed it bona fide *for the ſpace of one year, either in* Italy *or the provinces —— or, if it was immoveable, had poſſeſſed it for the term of two years within the limits of* Italy, *ſhould preſcribe to ſuch thing by uſe: and this was held to be law, leſt the dominion, or property of things, ſhould be uncertain. But altho' it was thought by the more antient legiſlators, that the above mentioned terms were of ſufficient length to inable every owner to ſearch after his different kinds of property, yet a better determination hath ſuggeſted itſelf to our thoughts, leſt the true owners ſhould be defrauded, or too haſtily excluded, by the circumſcription of time and place, from the benefit of recovering their juſt due: and we have therefore promulged our ordinance, by which it is provided, that things moveable may be preſcribed-to after the expiration of three years, and that a poſſeſſion, during a long tract of time, will alſo found a preſcription to things immoveable: and note, that, by* a long tract of time, *we mean ten years, if the parties are preſent,* (i.e. *in the province*) *and twenty years, if either of them is abſent. By theſe means the property of things may be acquired; and this not only in* Italy, *but throughout our dominions in general, if the poſſeſſion was juſtly founded.*

Et ideo conſtitutionem.] *vid. Cod. 7. t. 31. l. un. de uſucapione transformanda, et de ſublata differentia rerum mancipi et nec mancipi.* By the common law of *England* the time of preſcription is that time of which there is no memory of man, or *record*, to the contrary; for if there is any ſufficient proof of a record or writing to the contrary, altho' it exceeds the memory or proper knowledge of any man living, yet it is deemed to be within the memory of man: and this is the reaſon, that regularly a man can not preſcribe or allege a cuſtom againſt an act of parliament, becauſe it is the higheſt proof and matter of record in the law. *Co. Litt.* 115. But, altho' a preſcription is ſaid to be conſtituted by a portion of time, which exceeds the memory of man, yet this is not *always* true; for our laws admit a great variety of preſcriptions; which for the ſake of order may be divided into two ſorts; —— into thoſe, which ſecure us from loſs and puniſhment; and into thoſe, which inable us to acquire a property.

The ſtatute of the 31ſt of *Eliz.* cap. 5. bars all popular actions on account of offenſes by a preſcription of two years, in the caſe of the king, and by a preſcription of one year, when there is an informer. Other penal ſtatutes allow different periods to preſcribe in ——— as one year; (3 *H.* 7. c. 1. 31 *Eliz.* c. 4) ——— ſix months; (5 *Eliz.* c. 5.) ——— three months; (1 *Edw.* 6. c. 1.) ——— one month; (23 *Eliz.* c. 1.) *&c. &c. &c.* ——— and, by the common law, if a man is acquited upon an indictment of murder, he may after a year and a day plead preſcription againſt any appeal brought by the wife, or the next of kin to the party killed. *Natura brevium* 624. *G.* ——— Things immoveable alſo, whether corporeal or incorporeal, are variouſly preſcribed-to. The moſt uſual preſcription is that, which is called emphatically *the longeſt*, and extends beyond the memory of man; for whoever will preſcribe againſt another in regard to the maintenance of a chaplain to celebrate divine ſervice, the repairs of a church, an annuity, or any ſervice in his fee, he muſt prove them to have been time out of mind, or he does nothing. But there are preſcriptions of a ſhorter time, as of 40 years in the caſe of predial tithes, by the 2d and 3d of *Ed.* VI.— of five years for lands and tenements, when a fine hath been lawfully acknowledged with the due proclamations. (4 *Hen.* 7. c. 24.) ——— of three years, when lands and tenements gotten by forcible entry, have been ſo long held in quiet poſſeſſion; (8 *H.* 6. c. 9.) —— of a year and a day for a villein to aſſert his liberty againſt his lord, if the villein has continued ſo long in antient demeſne or in any of the king's cities or towns without being claimed or moleſted. ——— of a year and a day for the confirmation of any deed made by one, who is in priſon, unleſs he, who made it, doth in the interim revoke it. —— Alſo of a year and a day, to hinder the entry of him, who, having omited to make continual claim, indeavours, after a deſcent caſt, to recover lands and tenements, of which he hath been unjuſtly diſſeized. *Co.* 1. *inſt. page* 250 *&c. of continual claim.* But preſcriptions do not take place in all things. No man can preſcribe, for example, to things not in commerce, nor to

thoſe

thoſe, of which the king is properly the ſole lord; nor to a cuſtom, which is repugnant to reaſon or good manners. *Co. Litt. lib.* 2d. *ſect.* 212. *of villenage.* And it is a known maxim, in the laws of *England*, "that no preſcription in "lands maketh a right." *Doct.* and *Stud. Dial.* 1. *cap.* 8. *Cowel's inſt. h. t. Wood's inſt.* 297, 298.

De his, quæ ſunt extra commerciun.

§ I. Sed aliquando, etiamſi maxime quis bona fide rem poſſederit, non tamen illi uſucapio ullo tempore procedit: veluti ſi quis liberum hominem, vel rem ſacram, vel religioſam, vel ſervum fugitivum, poſſideat.

§ 1. *But it is certain in ſome caſes, that altho' there hath been a poſſeſſion inconteſtably* bona fide, *yet no length of time will be ſufficient to found a preſcription: and this happens, when a man poſſeſſes, as his property, a free perſon, a thing ſacred or religious, or a fugitive ſlave.*

De rebus furtivis, et vi poſſeſſis.

§ II. Furtivæ quoque res, et quæ vi poſſeſſæ ſunt, nec, ſi prædicto longo tempore bona fide poſſeſſæ fuerint, uſucapi poſſunt: nam furtivarum rerum lex duodecim tabularum, et lex Attilia, inhibent uſucapionem; vi poſſeſſarum lex Julia et Plautia. Quod autem dictum eſt, furtivarum et vi poſſeſſarum rerum uſucapionem per leges prohibitam eſſe, non eo pertinet, ut ne ipſe fur, quive per vim poſſidet, uſucapere poſſit, (nam his alia ratione uſucapio non competit; quia ſcilicet mala fide poſſident) ſed ne ullus alius, quamvis ab eis bona fide emerit, vel ex alia cauſa acceperit, uſucapiendi jus habeat. Unde in rebus mobilibus non facile procedit, ut bonæ fidei poſſeſſoribus uſucapio competat. Nam, qui ſciens alienam rem vendiderit, vel ex alia cauſa tradiderit, furtum ejus committit. Sed tamen id aliquando aliter ſe habet. Nam, ſi hæres rem defuncto commodatam, aut locatam, vel apud eum depoſitam, exiſtimans hæreditariam eſſe, bona fide accipienti vendiderit, aut donaverit, aut dotis nomine dederit, quin is, qui acceperit, uſucapere poſſit, dubium non eſt: quippe cum ea res in ſurti vitium non ceciderit; cum utique hæres, qui bona fide tanquam ſuam alienaverit, furtum non committat. Item ſi is, ad quem ancillæ uſusfructus pertinet, partum ſuum eſſe credens vendiderit, aut ſi donaverit, furtum non committit. Furtum enim, ſine affectu furandi, non committitur. Aliis quoque modis accidere poteſt, ut quis, ſine vitio furti, rem alienam ad aliquem transferat, et efficiat, ut à poſſeſſore uſucapiatur. Quod autem ad eas res, quæ ſolo continentur, expedit, jus ita procedit, ut, ſi quis loci vacantis poſſeſſionem, propter abſentiam aut negligentiam domini, aut quia ſine ſucceſſore deceſſerit, ſine vi nanciſatur, quamvis ipſe mala fide poſſideat, (quia intelligit, ſe alienum fundum occupaſſe) tamen, ſi alii bona fide accipienti tradiderit, poterit ei longa poſſeſſione res acquiri; quia neque furtivum, neque vi poſſeſſum, acceperit. Abolita eſt enim quorundam veterum ſententia, exiſtimantium, etiam fundi locive furtum fieri. Et eorum utilitati, qui res ſoli poſſident, principalibus conſtitutionibus proſpicitur, ne cui longa et indubitata poſſeſſio debeat auferri.

§ 2.

§ 2. *It is alſo equally certain, that no preſcription can be founded to things moveable, which have been ſtolen; or to things immoveable, ſeized by violence; altho' ſuch things have been poſſeſſed* bona fide, *during the length of time required by our conſtitution: for a preſcription to things ſtolen is prohibited by a law of the twelve tables, and alſo by the law* Attilia; *and the laws* Julia *and* Plautia *forbid a preſcription to things ſeized by violence. And it is not to be infered from theſe laws, that a thief, or diſſeizer only, is prohibited to take by preſcription; (for ſuch are prohibited for another reaſon, namely, becauſe they are fraudulent and diſhoneſt poſſeſſors;) but that all other perſons are alſo diſabled to preſcribe to things ſtolen, or ſeized forcibly, altho' they ſhall have purchaſed ſuch things* bona fide, *or otherwiſe received them upon a juſt account; and from hence it follows, that things moveable can not eaſily be preſcribed to, even by honeſt poſſeſſors: for whoever hath either ſold or delivered the goods of another knowingly, upon any conſideration, he is guilty of theft. But this rule ſometimes admits of exceptions; for in ſome caſes a thing moveable may be preſcribed to: thus, if an heir, thinking a particular thing to be hereditary, which in reality had only been lent, let to, or depoſited with the deceaſed, ſhall have ſold, given it, or otherwiſe diſpoſed of it to another, who rceeived it* bona fide, *it is not to be doubted but that the receiver may preſcribe: for ſuch thing can never be reputed* ſtolen, *inaſmuch as it was honeſtly poſſeſſed from the beginning; and the heir, who hath aliened it, believing it to have been his own property, hath commited no theft. Alſo if he, who hath the uſufruct of a female ſlave, either ſells or gives away the child of ſuch ſlave, believing it to be his own property, he does not commit theft; for theft can not be conſtituted without an intention to commit it. It may alſo happen, by various means, that one man may transfer the property of another without theft, and give a right of preſcription to the poſſeſſor. And in regard to things immoveable the law ordains, that, if any man ſhould take poſſeſſion of an eſtate without force, by reaſon either of the abſence, or negligence of the owner, or becauſe he died without heirs, and (altho' he hath thus poſſeſſed the land diſhoneſtly) ſhall have made livery of it to another, who took it* bona fide, *the land by long poſſeſſion may be acquired by ſuch taker, who can not be ſaid to have received either a thing ſtolen, or poſſeſſed by violence: for the opinion of thoſe antient lawyers, who held, that lands and things immoveable, might be ſtolen, is now aboliſhed: and it is therefore provided by the imperial conſtitutions, in favor of all ſuch, who poſſeſs an immoveable property, that a long and undoubted poſſeſſion ought not to be taken away.*

De vitio purgato.

§ III. Aliquando etiam furtiva, vel vi poſſeſſa, res uſucapi poteſt; veluti ſi in domini poteſtatem reverſa fuerit: tunc enim, vitio rei purgato, procedit ejus uſucapio.

§ 3. *A preſcription may ſometimes be founded even to things which have been ſtolen, or poſſeſſed by violence; as for inſtance, when ſuch things ſhall have fallen again under the power of their true owner; for they are then reputed to be purged from the contamination of theft or violence, and may afterwards be claimed by preſcription.*

De re fiſcali et bonis vacantibus.

§ IV. Res fiſci noſtri uſucapi non poteſt: ſed Papinianus ſcripſit, bonis vacantibus fiſco nondum nuntiatis, bonæ fidei emptorem traditam ſibi rem

ex

ex his bonis uſucapere poſſe; et ita Divus Pius, et Divi Severus et Antoninus reſcripſerunt.

§ 4. *The things, which appertain to our treaſury, cannot be acquired by preſcription. But, when things eſcheatable have not been certified to the treaſury, it is held by* Papinian, *that a purchaſer,* bona fide, *may preſcribe to any of them after delivery. And not only the emperor* Pius, *but the emperors* Severus *and* Antoninus *have alſo iſſued their reſcripts, conformable to this opinion.*

Regula generalis.

§ V. Noviſſime ſciendum eſt, rem talem eſſe debere, ut in ſe non habeat vitium, ut à bonæ fidei emptore uſucapi poſſit, vel qui ex alia juſta cauſa poſſidet.

§ 5. *It is laſtly to be obſerved, that, if any man ſhall purchaſe a particular thing* bona fide, *or obtain the poſſeſſion of it by any other juſt title, he can by no means preſcribe to it, unleſs the thing, in itſelf, is free from all manner of exception.*

De errore falſæ cauſæ.

§ VI. Error autem falſæ cauſæ uſucapionem non parit; veluti ſi quis, cum non emerit, emiſſe ſe exiſtimans, poſſideat, vel, cum ei donatum non fuerit, quaſi ex donato poſſideat.

§ 6. *A miſtake of the cauſe of poſſeſſion ſhall not give riſe to a preſcription: as when he, who poſſeſſes a thing, imagines, that he hath purchaſed it, when he hath not purchaſed it; or that the thing was a gift, when in reality it was not given.*

De acceſſione poſſeſſionis.

§ VII. Diutina poſſeſſio, quæ prodeſſe cœperat defuncto, et hæredi et bonorum poſſeſſori continuatur, licet ipſe ſciat, prædium alienum eſſe. Quod ſi ille initium juſtum non habuit, hæredi et bonorum poſſeſſori, licet ignoranti, poſſeſſio non prodeſt. Quod noſtra conſtitutio ſimiliter et in uſucapionibus obſervari conſtituit, ut tempora continuentur.

§ 7. *If a thing immoveable is poſſeſſed by any man* bona fide, *ſo that the poſſeſſion is juſtly commenced, then the heir of that man, when deceaſed, or the poſſeſſor of his goods, may continue the poſſeſſion, ſo as to raiſe a preſcription, altho' he is conſcious, that what he poſſeſſes is the property of another; but, if the poſſeſſion was commenced from the beginning* mala fide, *or unjuſtly, then will the continuance of it avail neither the heir, nor the poſſeſſor of the goods, altho' he was ignorant of any male-feazance. And we have enacted by our imperial conſtitution, that the time of uſucapion or preſcription to things moveable ſhall be continued in the ſame manner from the deceaſed to his ſucceſſor.*

Quod noſtra conſtitutio.] *vid. Cod. 7. t. 31. l. un. de uſucapione transformanda.*

§ VIII. Inter venditorem quoque et emptorem conjungi tempora, divi Severus et Antoninus reſcripſerunt.

§ 8. *And, in regard to the computation of the years, neceſſary to raiſe a preſcription, the emperors* Severus *and* Antoninus *have ordained by their reſcript, that,*

between ſeller and buyer, the time of the continuance of the poſſeſſion of the one ſhall be joined to the time of the continuance of the poſſeſſion of the other.

De his, qui à fiſco, aut Imp. Auguſtæve domo, aliquid acceperunt.

§ IX. Edicto divi Marci cavetur, eum, qui à fiſco rem alienam emit, ſi poſt venditionem quinquennium præterierit, poſſe dominum rei exceptione repellere. Conſtitutio autem divæ memoriæ Zenonis bene proſpexit iis, qui à fiſco per venditionem, aut donationem, vel alium titulum accipiunt aliquid; ut ipſi quidem ſecuri ſtatim fiant, et victores exiſtant, ſive experiantur, ſive conveniantur: adverſus autem ſacratiſſimum ærarium uſque ad quadriennium liceat iis intendere, qui pro dominio vel hypotheca earum rerum, quæ alienatæ ſunt, putaverint, ſibi quaſdam competere actiones. Noſtra autem divina conſtitutio, quam nuper promulgavimus, etiam de iis, qui à noſtra vel venerabilis Auguſtæ domo aliquid acceperint, hæc ſtatuit, quæ in fiſcalibus alienationibus præfatæ Zenonianæ conſtitutionis continentur.

§ 9. *It is enacted by an edict of the emperor* Marcus, *that, when a thing is purchaſed from the treaſury, the purchaſer, after an uninterrupted poſſeſſion of it for the ſpace of five years, ſubſequent to the ſale, may repel the true owner by an exception of preſcription. But the emperor* Zeno, *of ſacred memory, hath well provided by his conſtitution, that all thoſe, who by ſale, donation, or any other title, have received things either moveable, or immoveable, from the public treaſury, may inſtantly be ſecured in their poſſeſſion, and made certain of ſucceſs, whether they are plaintiffs or defendents—— and that thoſe, who think, that they are intituled to certain actions, either as proprietors or mortgagèes of the things aliened, may commence their ſuits againſt the treaſury, at any time within the ſpace of four years, but not afterwards. And, in our own ſacred ordinance, which we have lately promulged in favor of thoſe, who receive any thing, whether moveable or immoveable, from the private poſſeſſions either of our-ſelf, or of the empreſs, our conſort, we have made the ſame regulations, which are contained in the above mentioned conſtitution of the emperor* Zeno, *concerning fiſcal alienations.*

Edicto divi Marci.] *vid. Cod. 2. t. 37. l. 3.*
Conſtitutio autem.] *vid. Cod. 7. t. 37. l. 2.*
Divina conſtitutio.] *vid. Cod. 7. t. 36. l. 3.*

TITU-

TITULUS SEPTIMUS.

De donationibus.

D. xxxix. T. 5. et 6. C. viii. T. 54. Nov. 162.

De donatione.

EST et aliud genus acquiſitionis, donatio. Donationum autem duo ſunt genera; mortis cauſa, et non mortis cauſa.

There is another way, by which property is acquired, namely, by donation; of which there are two kinds; the one mortis cauſa, *i. e. on account of death; the other* non mortis cauſa, *i. e. not on account of death; and this takes effect, during the life of the donor.*

De mortis cauſa donatione.

§ I. Mortis cauſa donatio eſt, quæ propter mortis fit ſuſpicionem; cum quis ita donat, ut, ſi quid humanitus ei contigiſſet, haberet is, qui accipit: ſin autem ſupervixiſſet is, qui donavit, reciperet: vel ſi eum donationis pœnituiſſet, aut prior deceſſerit is, cui donatum ſit. Hæ mortis cauſa donationes ad exemplum legatorum redactæ ſunt per omnia: nam, cum prudentibus ambiguum fuerat, utrum donationis, an legati inſtar eam obtinere oporteret, (et utriuſque cauſæ quædam habebat inſignia,) et alii ad aliud genus eam retrahebant, à nobis conſtitutum eſt, ut per omnia fere legatis connumeretur, et ſic procedat, quemadmodum noſtra conſtitutio eam formavit. Et in ſumma mortis cauſa donatio eſt, cum magis ſe quis velit habere, quam eum, cui donat, magiſque eum, cui donat, quam hæredem ſuum. Sic et apud Homerum Telemachus donat Piræo.

Πειραι, σ' γαρ τ' ἰδμεν ὅπως ἐςαι ταδε ἐργα·
Ει κεν ἐμε μνηςηρες ἀγηνορες, ἐκ μεγαροισι
Λαθρη κτειναντες, πατρωϊα παντα δασσηαι,
Αυλον ἐχοντα σε βελομ' ἐπαυρεμεν, ἠ τινα των δε.
Εἰ δε κ' ἐγω τυτοισι φονον καὶ κηρα φυτευσω,
Δη τοτε μοι χαιρων φερειν ωρος δωματα χαιρων.

Hos verſus ſic vertere licebit.

Cum Piræe *homines lateant ſecreta futuri,*
Si me forte proci ſceleratis ad Styga mittant
Inſidiis, patriaſque velint erciſcere prædas;
Hæc ego præ reliquis multo tibi cedere malim:
Sin ego eos juſtis proſternam cladibus ultor,
Hæc mihi tu gaudens media inter gaudia reddas.

§ 1. *A donation on account of death it that, which is made under an apprehenſion or ſuſpicion of death: as when any thing is given upon condition, that, if the donor dies, the donèe ſhall poſſeſs it abſolutely; or that the thing given ſhall be returned, if the donor ſhould ſurvive the danger, which he apprehends; or ſhould repent, that he hath made the gift; or, if the donèe ſhould die before the donor. Donations,* mortis cauſa, *are now reduced, as far as poſſible, to the ſimilitude of legacies: for, when it was much doubted by our lawyers, whether a donation* mortis cauſa *ought to be reputed as a gift, or as a legacy, inaſmuch as, in ſome things, it partakes of the nature of both, we then* conſtituted *and* ordained, *that every ſuch donation ſhould be conſidered as a legacy; and be made in the manner, which our conſtitution directs. But, in brief, a donation,* mortis cauſa, *is then ſaid to be made, when a man ſo gives, as to demonſtrate, that he would rather poſſeſs the thing given himſelf, than that the donèe ſhould poſſeſs it; and yet, at the ſame time, evinces, that he is more willing, that the donèe ſhould poſſeſs it, than his own heir.*

The donation, which Telemachus *makes to* Piræus *in* Homer, *is of this ſpecies.*

> He (when *Piræus* aſk'd for ſlaves, to bring
> The gifts and treaſures of the *Spartan* king)
> Thus thoughtful anſwer'd: —— thoſe we ſhall not move,
> Dark and unconſcious of the will of *Jove.*
> We know not yet the full event of all:
> Stabb'd in his palace, if your prince muſt fall,
> Us, and our houſe, if treaſon muſt o'erthrow,
> Better a friend poſſeſs them than a foe.
> But on my foes ſhould vengeance heav'n decree,
> Riches are welcome then, not elſe, to me.
> 'Till then, retain the gifts. ——————

POPE's *Odyſſ. lib.* 17.

Quemadmodum noſtra conſtitutio.] *vid. Cod.* 8. *t.* 57. *l.* 4.

De ſimplice inter vivos donatione.

§ II. Aliæ autem donationes ſunt, quæ ſine ulla mortis cogitatione fiunt, quas inter vivos appellamus, quæ non omnino comparantur legatis: quæ, ſi fuerint perfectæ, temere revocari non poſſunt. Perficiuntur autem, cum donator ſuam voluntatem ſcriptis aut ſine ſcriptis manifeſtaverit. Et, ad exemplum venditionis, noſtra conſtitutio eas etiam in ſe habere neceſſitatem traditionis voluit, ut, etiamſi non tradantur, habeant pleniſſimum et perfectum robur, et traditionis neceſſitas incumbat donatori. Et, cum retro principum diſpoſitiones inſinuari eas actis intervenientibus volebant, ſi majores fuerant ducentorum ſolidorum, conſtitutio noſtra eam quantitatem uſque ad quingentos ſolidos ampliavit, quam ſtare etiam ſine inſinuatione ſtatuit: ſed et quaſdam donationes invenit, quæ penitus inſinuationem fieri minime deſiderant, ſed in ſe pleniſſimam habent firmitatem. Alia inſuper multa ad uberiorem exitum donationum invenimus, quæ omnia ex noſtris conſtitutionibus, quas ſuper his expoſuimus, colligenda ſunt. Sciendum

eſt

eſt tamen, quod, etſi pleniſſimæ ſint donationes, ſi tamen ingrati exiſtant homines, in quos beneficium collatum eſt, donatoribus per noſtram conſtitutionem licentiam præſtitimus certis ex cauſis eas revocare; ne illi, qui ſuas res in alios contulerint, ab his quandam patiantur injuriam vel jacturam, ſecundum enumeratos in conſtitutione noſtra modos.

§ 2. *Donations, made without any thought or apprehenſion of death, we call donations* inter vivos; *and theſe admit of no compariſon with legacies: for, when once they are perfected, they can not afterwards be revoked without cauſe: and donations are then eſteemed perfect, when the donor hath declared and manifeſted his will either in writing or otherwiſe. And it is appointed by our conſtitution, that a donation* inter vivos *ſhall, in imitation of a ſale, neceſſarily inforce a delivery; for when things are given they become fully and perfectly veſted in the donèe, and it is incumbent upon the donor to deliver them: and altho' it is enacted by the conſtitutions of our predeceſſors, that donations, amounting to the value of two hundred* ſolidi, *ſhall be publicly and formally inrolled and regiſtered, we have yet thought it expedient to inlarge this ſum to five hundred* ſolidi *by our ordinance, by which we permit all donations of leſs value to be firm and binding without inſinuation or inrollment; and there are likewiſe ſome donations, which, altho' they exceed five hundred* ſolidi, *are yet of full force without inſinuation. We have alſo, for the inlargement of donations, enacted many other rules, all which may be collected by peruſing our conſtitutions, ſet forth for that purpoſe. It nevertheleſs remains to be obſerved, that, when a donation is fully and validly made, the donor may revoke it on account of ingratitude in the donée in ſome particular caſes: and this may be done, leſt he, who hath been liberal and kind to another, ſhould in any of the inſtances, enumerated in our conſtitution, ſuffer either injury or damage from him, upon whom a benefit was confered.*

Noſtra conſtitutio.] *vid. Cod.* 8. *t.* 54. *l.* 35.
Conſtitutio noſtra.] *vid. Cod.* 8. *t.* 54. *l.* 36.
Enumeratos in conſtitutione.] *vid. Cod.* 8. *t.* 56. *l.* 10.

De donatione ante nuptias vel propter nuptias.

§ III. Eſt et aliud genus inter vivos donationis, quod veteribus quidem prudentibus penitus erat incognitum, poſtea autem à junioribus Divis Principibus introductum eſt, quod ante nuptias vocabatur, et tacitam in ſe conditionem habebat, ut tunc ratum eſſet, cum matrimonium eſſet inſecutum: ideoque ante nuptias vocabatur, quod ante matrimonium efficiebatur: et nunquam poſt nuptias celebratas talis donatio procedebat. Sed primus quidem Divus Juſtinus pater noſter, cum augeri dotes et poſt nuptias fuerat permiſſum, ſi quid tale eveniret, et ante nuptias augeri donationem, et conſtante matrimonio, ſua conſtitutione permiſit: ſed tamen nomen inconveniens remanebat, cum ante nuptias quidem vocabatur, poſt nuptias autem tale accipiebat incrementum. Sed nos pleniſſimo fini tradere ſanctiones cupientes, et conſequentia nomina rebus eſſe ſtudentes, conſtituimus, ut tales donationes non augeantur tantum, ſed etiam conſtante matrimonio initium accipiant: et non ante nuptias, ſed propter nuptias, vocentur: et dotibus in hoc exæquentur, ut quemadmodum dotes conſtante matrimonio non ſolum augentur, ſed etiam fiunt, ita et iſtæ donationes,

quæ

quæ propter nuptias introductæ ſunt, non ſolum antecedant matrimonium, ſed eo etiam contracto augeantur et conſtituantur.

§ 3. *There is alſo another ſpecies of donations* inter vivos, *which was wholly unknown to the antient lawyers, being introduced by later emperors: this ſpecies of donations* inter vivos *was called* ante nuptias, *(i. e. before marriage) and contained in it the following tacit condition; namely, that it ſhould then take effect, when the marriage was performed; and theſe donations were properly called* ante nuptias, *becauſe they could never be conſtituted after the celebration of matrimony. But, inaſmuch as it was permited by the antient law, that portions might be augmented after marriage, the emperor* Juſtin, *our father, hath enacted by his conſtitution, that donations called* ante nuptias *might alſo be augmented at any time, whileſt the matrimony ſubſiſted: and, as it was improper, that a donation ſhould be ſtill termed* ante nuptias, *when it had received an augmentation* poſt nuptias, *i. e. after matrimony, we therefore, being deſirous, that our ſanctions might become as perfect as poſſible, and that names ſhould be properly adapted to things, have ordained and conſtituted, that the above mentioned donations may be not only augmented, but may alſo receive their commencement at any time during matrimony, and that for the future they ſhall not be called donations* ante nuptias, *but donations* propter nuptias; *i. e. on acconnt of marriage: and thus theſe donations are made equal with portions; for as portions may be augmented, and even made, when matrimony is ſubſiſting and perſons are actually married, ſo donations, which are introduced on account of matrimony, may now not only precede marriage, but be augmented, or even conſtituted, after the celebration of it.*

Sua conſtitutione.] *vid. Cod.* 5. *t.* 3. *l.* 19.

Conſtituimus.] *vid. Cod.* 5. *t.* 3. *l.* 20. beginning thus—— *Sancimus, nomine prius emendato, ita rem corrigi, et non* ante nuptias donationem *eandem vocari, ſed* PROPTER NUPTIAS DONATIONEM.

De jure accreſcendi.

§ IV. Erat olim et alius modus civilis acquiſitionis per jus accreſcendi, quod eſt tale; ſi, communem ſervum habens aliquis cum Titio, ſolus libertatem ei impoſuerit, vel vindicta vel teſtamento, eo caſu pars ejus amittebatur, et ſocio accreſcebat. Sed cum peſſimum fuerat exemplo, et libertate ſervum defraudari, et ex eo humanioribus quidem dominis damnum inferri, ſeverioribus autem dominis lucrum accedere, hoc, quaſi invidia plenum, pio remedio per noſtram conſtitutionem mederi neceſſarium duximus. Et invenimus viam, per quam manumiſſor, et ſocius ejus, et qui libertatem accepit, noſtro beneficio fruantur, libertate cum effectu procedente, (cujus favore antiquos legum latores multa etiam contra communes regulas ſtatuiſſe manifeſtum eſt,) et eo, qui eam libertatem impoſuit, ſuæ liberalitatis ſtabilitate gaudente, et ſocio indemni conſervato, pretiumque ſervi ſecundum partem dominii, quod nos definivimus, accipiente.

§ 4. *There was formerly another manner of acquiring property by the civil law; namely by accretion; as for inſtance, if* Primus *had poſſeſſed a ſlave in common with* Titius, *and* Primus *had infranchiſed that ſlave, either by the* vindicta *or by teſtament, then would the ſhare of* Primus *in that ſlave be loſt and accrue to* Titius. *But, inaſmuch as it affords a bad example, that a man ſhould be defrauded of his liberty, and that thoſe maſters, who are moſt humane, ſhould ſuffer loſs, whileſt thoſe, who*

are

are moſt ſevere, receive emolument, we have thought it neceſſary, that a proper remedy ſhould be applied to this grievance; and we have found a method, by which the manumittor, his co-partener, and the freed perſon, may all partake of our beneficence: for we have decreed, (and it is manifeſt, that the antient legiſlators have often tranſgreſſed the ſtrict rules of law in favor of liberty,) that freedom, altho' granted by one partener only, ſhall immediately take effect; ſo that the manumittor ſhall have reaſon to be pleaſed with the validity of his gift, if his co-partener is indemnified by receiving his ſhare of the worth of the ſlave.

Quod nos definivimus.] *vid. Cod. 7. t. 7. l. 1. de communi ſervo manumiſſo.*

TITULUS OCTAVUS.

Quibus alienare licet, vel non licet.

De marito, qui, licet fundi dotalis dominus ſit, alienare nequit.

ACCIDIT aliquando, ut, qui dominus rei ſit, alienare non poſſit: et contra, qui dominus non ſit, alienandæ rei poteſtatem habeat. Nam dotale prædium maritus, invita muliere, per legem Juliam prohibetur alienare; quamvis ipſius ſit, dotis cauſa ei datum: quod nos, legem Juliam corrigentes, in meliorem ſtatum deduximus. Cum enim lex in ſolis tantummodo rebus locum habebat, quæ Italicæ fuerant, et alienationes inhibebat, quæ invita muliere fiebant, hypothecas autem earum rerum etiam volente ea, utique remedium impoſuimus, ut etiam in eas res, quæ in provinciali ſolo poſitæ ſunt, interdicta ſit alienatio vel obligatio, ut neutrum eorum neque conſentientibus mulieribus procedat: ne ſexus muliebris fragilitas in perniciem ſubſtantiæ earum convertatur.

It ſometimes happens, that the proprietor of a thing can not alien it, and on the contrary that he, who is not the proprietor, may alien it: for example, by the law Julia *an huſband is prohibited to make an alienation of lands, which came to him in right of his wife, unleſs his wife conſents to the alienation; and yet every man is deemed the proprietor of whatever is given to him, as a marriage portion. But, in this reſpect, we have corrected the law* Julia, *and brought it into a better ſtate: for, having obſerved, that this law regards only thoſe immoveable poſſeſſions, which are ſituated within the precincts of* Italy; *and that, altho' it inhibits the huſband to make a mortgage of ſuch poſſeſſions, even with the conſent of his wife, yet it permits him, with the conſent of his wife, to make an alienation, we have therefore provided a remedy by our imperial authority; ſo that now no huſband can either alien or mortgage, even with the conſent of his wife, any immoveable poſſeſſion, whether* provincial *or* Italian, *obtained with her, as a marriage portion; and we have been induced to make theſe regulations, leſt the frailty of women ſhould occaſion the ruin of their fortunes.*

Remedium impoſuimus.] *vid. Cod. 5. t. 13. l. un.*

§ I.

De creditore, qui, licet non ſit dominus, tamen alienare pignus poteſt.

§ I. Contra autem creditor pignus, ex pactione, quamvis ejus ea res non ſit, alienare poteſt. Sed hoc forſitan ideo videtur fieri, quod voluntate debitoris intelligitur pignus alienari, qui ab initio contractus pactus eſt, ut liceret creditori pignus vendere, ſi pecunia non ſolvatur. Sed, ne creditores jus ſuum perſequi impedirentur, neque debitores temere ſuarum rerum dominium amittere viderentur, noſtra conſtitutione conſultum eſt, et certus modus impoſitus eſt, per quem pignorum diſtractio poſſit procedere ; cujus tenore utrique parti creditorum et debitorum ſatis abundeque proviſum eſt.

§ 1. *But a creditor, by virtue of a compact, may ſell or alien a pledge, altho' it is not his own property ; yet this ſeems to be allowable for no other reaſon, than becauſe the pledge is underſtood to be aliened by the conſent of the debtor, with whom it was covenanted from the commencement of the contract, that the creditor might be permited to ſell the pledge, if the money borrowed was not paid at the time ſtipulated. But, leſt creditors ſhould be impeded from proſecuting, what is juſtly due to them, and leſt debtors, on the contrary, ſhould loſe the property of their poſſeſſions too ſoon, we have in our ordinance, promulged for this purpoſe, inſtituted certain methods, by which the ſale of pledges may be warrantably made : and, thro' the whole tenor of our conſtitution, a ſufficient caution hath been taken in regard to both creditors and debtors.*

Conſtitutione conſultum eſt.] *vid. Cod.* 8. *t.* 34. *l.* 3.

De pupillo, qui, licet dominus, non tamen ſine tutoris auctoritate alienare poteſt.

§ II. Nunc admonendi ſumus, neque pupillum, neque pupillam, ullam rem ſine tutoris auctoritate alienare poſſe. Ideoque, ſi mutuam pecuniam ſine tutoris auctoritate alicui dederit, non contrahit obligationem: quia pecuniam non facit accipientis : ideoque vindicari nummi poſſunt, ſicubi extant. Sed, ſi nummi, quos mutuo minor dederit, ab eo, qui accepit, bona fide conſumpti ſunt, condici poſſunt : ſi mala fide, ad exhibendum de his agi poteſt.

§ 2. *It muſt now be obſerved, that no pupil, whether male or female, hath power to alien any thing without the authority of a tutor : and therefore, if a pupil, without the authority of his tutor, ſhall lend money to any man, ſuch pupil contracts no obligation : for he is incapable of veſting the property of his money in the borrower ; and therefore the money may be claimed by* vindication, *(that is, by a real action,) if it exiſts intire and unſpent. But if money, lent by a minor, is conſumed by the borrower,* bona fide, *(i. e. believing that the lendor was of full age) it may be recovered from ſuch borrower by condiction, that is, by a perſonal action. And, if ſuch money is conſumed by the borrower* mala fide, *an action* ad exhibendum *will lie againſt him.*

§ III.

De pupillo, qui, licet ſit dominus, tamen alienare non poteſt.

§ III. At ex contrario omnes res pupillo et pupillæ ſine tutoris auctoritate recte dari poſſunt: ideoque, ſi debitor pupillo ſolvat, neceſſaria eſt debitori tutoris auctoritas: alioqui non liberabitur. Sed hoc etiam evidentiſſima ratione ſtatutum eſt in conſtitutione, quam ad Cæſarienſes advocatos ex ſuggeſtione Triboniani, viri eminentiſſimi, quæſtoris ſacri palatii noſtri, promulgavimus: qua diſpoſitum eſt, ita licere tutori vel curatori debitorem pupillarem ſolvere, ut prius judicialis ſententia ſine omni damno celebrata hoc permittat: quo ſubſecuto, ſi et judex pronunciaverit, et debitor ſolverit, ſequatur hujuſmodi ſolutionem pleniſſima ſecuritas. Sin autem aliter, quam diſpoſuimus, ſolutio facta fuerit, pecuniam autem ſalvam habeat pupillus, aut ex ea locupletior ſit, et adhuc eandem pecuniæ ſummam petat, per exceptionem doli mali poterit ſubmoveri. Quod ſi male conſumpſerit, aut furto aut vi amiſerit, nihil proderit debitori doli mali exceptio, ſed nihilominus condemnabitur: quia temere ſine tutoris auctoritate, et non ſecundum noſtram diſpoſitionem, ſolverit. Sed ex diverſo pupilli vel pupillæ ſolvere ſine tutoris auctoritate non poſſunt: quia id, quod ſolvunt, non fit accipientis: cum ſcilicet nullius rei alienatio eis ſine tutoris auctoritate conceſſa ſit.

§ 3. *But, on the contrary, the property of any thing may be transfered to pupils, whether male or female, without the authority of their tutors: yet, if a debtor makes a payment to a pupil, it is neceſſary, that the debtor ſhould be warranted by the authority of the pupil's tutor; otherwiſe he will not be acquited of the debt: and this, for a moſt evident reaſon, was ordained by a conſtitution, which we promulged to the advocates of* Cæſarea, *at the ſuggeſtion of that moſt eminent man* Tribonian, *the queſtor of our ſacred palace: and by this conſtitution it is enacted, that the debtor of a minor may lawfully pay any ſum to his tutor or curator, if a judicial decree, permiting the payment, is previouſly obtained without expenſe to the minor: for, when the payment of a debt is warranted by, and ſubſequent to, the decree of a judge, it is always attended with the fulleſt ſecurity. But, altho' money hath been paid to a pupil, otherwiſe than we have ordained, yet, if he ſhould afterwards require, that the money ſhould be paid him again, and demand it by action, he might be deprived of his plea by an* exception *of* fraud, *if it could be proved, that he had become richer by the increaſe of this money; or even, that he had preſerved it ſafely. But, if the pupil hath ſquandered and conſumed the money paid to him, or loſt it either by theft or violence, an exception of fraud will be of no benefit to the debtor, who will be compelled to make a ſecond payment, becauſe the firſt was made inconſiderately, without the authority of the tutor, and not according to our ordinance. Pupils are alſo incapacitated to pay money without the authority of their tutors; becauſe money, when paid by a pupil without ſuch authority, doth not become the property of him, to whom it is paid: for the alienation of no one thing is granted to a pupil without the authority of his tutor.*

Statutum eſt in conſtitutione.] *vid. Cod. 5. t. 37. ll. 25, 27.*

TITULUS NONUS.

Per quas perſonas cuique acquiritur.

C. iv. T. 27.

Summa.

ACQUIRITUR vobis non ſolum per voſmetipſos, ſed etiam per eos, quos in poteſtate habetis: item per ſervos, in quibus uſumfructum habetis: item per homines liberos, et per ſervos alienos, quos bona fide poſſidetis: de quibus ſingulis diligentius deſpiciamus.

Things may be acquired not only by ourſelves, but alſo by thoſe, who are under our power; and alſo by ſlaves, of whom we have the uſufruct only—— acquiſitions may alſo be made for us by free-men—— and even by ſlaves, whom we poſſeſs bona fide, *altho' they are the property of another. Let us therefore inquire diligently concerning all theſe perſons.*

De liberis in poteſtate.

§ I. Igitur liberi veſtri utriuſque ſexus, quos in poteſtate habetis, olim quidem quicquid ad eos pervenerat, (exceptis videlicet caſtrenſibus peculiis,) hoc parentibus ſuis acquirebant ſine ulla diſtinctione: et hoc ita parentum fiebat, ut etiam eſſet iis licentia quod per unum vel unam eorum acquiſitum eſſet, alii filio, vel extraneo donare, vel vendere, vel, quocumque modo voluerant, applicare: quod nobis inhumanum viſum eſt: et generali conſtitutione emiſſa, et liberis pepercimus, et parentibus honorem debitum reſervavimus: ſancitum etenim à nobis eſt, ut, ſi quid ex re patris ei obveniat, hoc ſecundum antiquam obſervationem totum parenti acquiratur. Quæ enim invidia eſt, quod ex patris occaſione profectum eſt, hoc ad eum reverti? Quod autem ex alia cauſa ſibi filiusfamilias acquiſivit, hujus uſumfructum patri quidem acquirat, dominium autem apud eum remaneat: ne, quod ei ſuis laboribus vel proſpera fortuna acceſſerit, hoc in alium perveniens, luctoſum ei procedat.

§ 1. *It was antiently the law, that whatever eſtate came to children, whether male or female, who were under the power of their parents, it was acquired for the parents of ſuch children without any diminution, if we except the* peculium caſtrenſe: *and theſe eſtates were ſo abſolutely veſted in the parents, that what was acquired by one child they might have given to another child, or to a ſtranger; or might have ſold it, or applied it in what manner, and to what purpoſe they thought proper: but this ſeemed to be inhuman; and we have therefore, by a general conſtitution, mitigated the rigor of the law in regard to children, and have, at the ſame time, maintained that honor, which is due to parents; having ordained, that, if any thing accrues to the ſon by means of the father's fortune, the* whole *ſhall be acquired for the father, according to antient practice: (for can it be unjuſt, that the wealth, which the ſon hath obtained,*

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by means of the father, ſhould revert to him?) but that the dominion and property of whatever the ſon of a family hath acquired, by any other means, ſhall remain in the ſon; and that the father ſhall be intituled only to the uſufruct of ſuch acquiſition. And this we have thought proper to decree, leſt that, which hath accrued to a man from his labor or good fortune, ſhould be unjuſtly transfered to another.

Generali conſtitutione.] *vid. Cod.* 6. *t.* 61. *l.* 6.

De emancipatione liberorum.

§ II. Hoc quoque à nobis diſpoſitum eſt et in ea ſpecie, ubi parens, emancipando liberos ſuos, ex rebus, quæ acquiſitionem effugiebant, ſibi tertiam partem retinere (ſi voluerat) licentiam ex anterioribus conſtitutionibus habebat, quaſi pro pretio quodammodo emancipationis: et inhumanum quiddam accidebat, ut filius rerum ſuarum ex hac emancipatione dominio pro tertia parte defraudaretur: et, quod honoris ei ex emancipatione additum erat, quod ſui juris effectus eſſet, hoc per rerum diminutionem decreſceret. Ideoque ſtatuimus, ut parens pro tertia parte dominii, quam retinere poterat, dimidiam non dominii rerum, ſed uſusfructus, retineat. Ita etenim res intactæ apud filium remanebunt, et pater ampliore ſumma fruetur, pro tertia, dimidia potiturus.

§ 2. *We have alſo regarded the intereſt of children in reſpect to emancipation: for a parent, when he emancipated his children, might, according to former conſtitutions, have taken to himſelf, if he was ſo inclined, the property of the third part of thoſe things, which were excepted from paternal acquiſition, retaining it as the price of emancipation. But it appeared to be inhuman, that the ſon ſhould be thus defrauded of the third part of his property, and that the honor, which he had obtained by becoming independent, ſhould be decreaſed by the diminution of his eſtate; and we have therefore decreed, that the parent inſtead of the third part of the property, which he formerly might have retained, ſhall now be intituled to an half-ſhare, not of the property, but of the uſufruct; ſo that the property will, for the future, remain intire in the ſon, and the father will enjoy a greater ſhare; namely, half inſtead of a third part.*

Ex anterioribus conſtitutionibus.] *vid. ll.* 1, 2. Ideoque ſtatuimus.] *vid. Cod.* 6. *t.* 61. *l.* 6. *Cod. Theod. de maternis bonis.*

De ſervis noſtris.

§ III. Item vobis acquiritur, quod ſervi veſtri ex traditione nanciſcuntur, ſive quid ſtipulentur, ſive ex donatione, vel ex legato, vel ex qualibet alia cauſa, acquirant. Hoc enim vobis et ignoantibus et invitis obvenit; ipſe enim ſervus, qui in poteſtate alterius eſt, nihil ſuum habere poteſt. Sed, ſi hæres inſtitutus ſit, non alias, niſi veſtro juſſu, hæreditatem adire poteſt. et, ſi vobis jubentibus adierit, vobis hæreditas acquiritur, perinde ac ſi vos ipſi hæredes inſtituti eſſetis. Et convenienter ſcilicet vobis legatum per eos acquiritur. Non ſolum autem proprietas per eos, quos in poteſtate habetis, vobis acquiritur, ſed etiam poſſeſſio: cujuſcunque enim rei poſſeſſionem adepti fuerint, id vos poſſidere videmini. Unde etiam per eos uſucapio, vel longi temporis poſſeſſio, vobis accidit.

§ 3. *Whatever our ſlaves have at any time acquired, whether by delivery, ſtipulation, donation, bequeſt, or any other means, the ſame is reputed to be acquired by ourſelves, and we thus acquire things, altho' we are ignorant of, or even averſe to, the acquiſition; for he, who is a ſlave, can have no property. And, if a ſlave is inſtituted an heir, he can not otherwiſe take upon himſelf the inheritance, than at the command of his maſter; but, if the ſlave is commanded to do this, the inheritance is as fully acquired by the maſter, as if he had been himſelf made the heir; and conſequently a legacy, left to a ſlave, is acquired by his maſter. It is farther to be obſerved, that maſters acquire by their ſlaves not only the property of things, but alſo the poſſeſſion; for whatever is poſſeſſed by a ſlave, the ſame ſeems to be poſſeſſed by his maſter; who may therefore found a preſcription to it by means of his ſlave.*

De fructuariis et bona fide poſſeſſis.

§ IV. De iis autem ſervis, in quibus tantummodo uſumfructum habetis, ita placuit, ut, quicquid ex re veſtra, vel ex operis ſuis, acquirunt, id vobis adjiciatur; quod vero extra eas cauſas conſecuti ſunt, id ad dominum proprietatis pertineat. Itaque, ſi is ſervus hæres inſtitutus ſit, legatumve quid ei, aut donatum fuerit, non uſufructuario ſed domino proprietatis acquiritur.

§ 4. *In regard to thoſe ſlaves, of whom the poſſeſſor has the uſufruct only, it is an eſtabliſhed rule, that whatever they acquire by means of his goods, or by their own work and labor, it appertains to their uſufructuary maſter. But whatever is obtained by a ſlave, otherwiſe than by thoſe means, it belongs to him, who hath the property of the ſlave: and therefore, if a ſlave is inſtituted an heir, or hath received a legacy, or a gift, the inheritance, legacy, or gift, will not be acquired for the uſufructuary maſter, but for the proprietor.*

Continuatio.

§ V. Idem placet et de eo, qui à vobis bona fide poſſidetur, ſive is liber ſit, ſive alienus ſervus: quod enim placuit de uſufructuario, idem placet et de bonæ fidei poſſeſſore. Itaque, quod extra iſtas duas cauſas acquiritur, id vel ad ipſum pertinet, ſi liber eſt, vel ad dominum, ſi ſervus eſt. Sed bonæ fidei poſſeſſor, cum uſuceperit ſervum, (quia eo modo dominus fit,) ex omnibus cauſis per eum ſibi acquirere poteſt. Fructuarius vero uſucapere non poteſt: primum quia non poſſidet, ſed habet jus utendi, fruendi: deindè, quia ſcit, ſervum alienum eſſe. Non ſolum autem proprietas per eos ſervos, in quibus uſumfrumctum habetis, vel quos bona fide poſſidetis, aut per liberam perſonam, quæ bona fide vobis ſervit, vobis acquiritur, ſed etiam poſſeſſio. Loquimur autem in utriuſque perſona ſecundum diſtinctionem, quam proxime expoſuimus, id eſt, ſi quam poſſeſſionem ex re veſtra, vel ex ſuis operis, adepti fuerint.

§ 5. *The ſame rule is obſerved in regard to him, who is poſſeſſed ás a ſlave* bona fide, *whether he is a free man, or the ſlave of another: for the law concerning an uſufructuary maſter prevails equally in relation to a* bona fide *poſſeſſor; and therefore whatever is acquired otherwiſe, than by the two cauſes abovementioned, it either belongs to the perſon poſſeſſed, if he is free; or to the proprietor, if the perſon poſſeſſed*

is

is the ſlave of another. But a bona fide *poſſeſſor, who hath gained a ſlave by* uſucapion *or preſcription, (inaſmuch as he thus becomes the abſolute proprietor,) can acquire by virtue of ſuch ſlave, by all manner of ways. But an uſufructuary maſter can not preſcribe; firſt, becauſe he can never be ſtrictly ſaid to poſſeſs, having only the power of uſing: and farther, becauſe he knows, that the ſlave belongs to another. We nevertheleſs may acquire not only property, but alſo poſſeſſion, by means of the ſlaves, whom we poſſeſs* bona fide, *or of whom we have only the uſufruct; and even by means of a free perſon, of whom we have a* bona fide *poſſeſſion. But, in ſaying this, we adhere to the diſtinction, which we have before explained, and ſpeak of thoſe things only, of which a ſlave may acquire the poſſeſſion, either by means of the goods of his maſter, or by his own induſtry.*

De reliquis perſonis.

§ VI. Ex his itaque apparet, per liberos homines, quos neque veſtro juri ſubjectos habetis, neque bona fide poſſidetis, item per alienos ſervos, in quibus neque uſumfructum habetis, neque poſſeſſionem juſtam, nulla ex cauſa vobis acquiri poſſe. Et hoc eſt, quod dicitur, per extraneam perſonam nihil acquiri poſſe; excepto eo, quod per liberam perſonam (veluti per procuratorem) placet non ſolum ſcientibus, ſed et ignorantibus, vobis acquiri poſſeſſionem, ſecundum Divi Severi conſtitutionem; et per hanc poſſeſſionem etiam dominium, ſi dominus fuerit, qui tradidit; vel uſucapionem aut longi temporis præſcriptionem, ſi dominus non ſit.

§ 6. *It is apparent from what has been ſaid, that we can by no means make acquiſitions by free perſons, who are not under our ſubjection nor poſſeſſed by us* bona fide: *neither can we acquire property by another's ſlave, of whom we have neither the uſufruct, nor the juſt poſſeſſion. And this is meant, when it is ſaid, that nothing can be acquired by means of a ſtranger; which we muſt underſtand with an exception; for it hath been determined according to the conſtitution of the emperor* Severus, *that poſſeſſion may be acquired for us by a free perſon, as for inſtance by a proctor, not only with, but even without our knowledge; and, by this poſſeſſion, the property may be gained, if the delivery was made by the proprietor; and an uſucapion or preſcription may be acquired, altho' the delivery was made by one, who was not the proprietor.*

Divi Severi conſtitutionem.] *vid. Cod. 7. t. 32. l. 1.*

Tranſitio.

§ VII. Hactenus tantiſper admonuiſſe ſufficiat, quemadmodum ſingulæ res vobis acquirantur: nam legatorum jus, quo et ipſo ſingulæ res vobis acquiruntur, item fideicommiſſorum, ubi ſingulæ res vobis relinquuntur, opportunius inferiore loco referemus. Videamus itaque nunc, quibus modis per univerſitatem res vobis acquirantur. Si cui ergo hæredes facti ſitis, ſive cujus bonorum poſſeſſionem petieritis, vel ſi quem adrogaveritis, vel ſi cujus bona, libertatum conſervandarum cauſa, vobis addicta fuerint, ejus res omnes ad vos tranſeunt. Ac prius de hæreditatibus diſpiciamus, quarum duplex conditio eſt; nam vel ex teſtamento, vel ab inteſtato, ad

vos pertinent. Et prius eſt, ut de his deſpiciamus, quæ ex teſtamento vobis obveniunt; qua in re neceſſarium eſt initium de teſtamentis ordinandis exponere.

§ 7. *The obſervations, which we have already made, concerning the acquiſition of particular things, may ſuffice for the preſent; for we ſhall treat more opportunely hereafter in another place of the rights of legacies and truſts. We will now proceed to ſhew, how things may be acquired* per univerſitatem, *that is, wholly and in groſs by one ſingle acquiſition: for example; if* Titius *is nominated an heir, or ſeeks the poſſeſſion of the goods of another, or arrogates any one as his ſon, or if goods are adjudged to him for the ſake of preſerving the liberty of ſlaves; in all theſe caſes, the intire inheritance paſſes to* Titius. *Let us now therefore inquire into inheritances, which are of a twofold nature; for they proceed either from a teſtacy, or an inteſtacy. We will firſt treat of thoſe, which come to us by teſtament; and, in doing this, it will be neceſſary to begin by explaining the manner of making teſtaments.*

TITULUS DECIMUS.

De teſtamentis ordinandis.

D. xxviii. T. 1. C. vi. T. 23. Nov. 66. 119.

Etymologia.

TESTAMENTUM ex eo appellatur, quod teſtatio mentis ſit.

A teſtament is ſo called from the latin word teſtatio; *becauſe it bears witneſs or teſtimony to the determination of the mind.*

Teſtamentum ex eo.] The writers on the civil law give various definitions of a teſtament. *Modeſtinus* calls it *voluntatis noſtræ juſta ſententia de eo, quod quis poſt mortem ſuam fieri velit.*—— *Ulpian* defines it to be *mentis noſtræ juſta conteſtatio, in id ſolemniter facta, ut poſt mortem noſtram valeat.*—— But others, with a greater degree of exactneſs, define a teſtament "to be the appoint-"ment of an executor or teſtamentary heir, "made according to the formalities, preſcribed "by law. *Domat. lib. 1. t. 1. ſect. 1.*" For in reality the conſtitution of an heir, or an executor, is the eſſence of a teſtament, and that, which diſtinguiſhes it from a codicil, or donation *mortis cauſa. Quinque verbis poteſt quis facere teſtamentum, ut dicat,* LUCIUS TITIUS MIHI HÆRES ESTO. *ff. 28. t. 5. l. 1. Swin. p. 3, 4, 5.*

De antiquis modis teſtandi civilibus.

§ 1. Sed, ut nihil antiquitatis penitus ignoretur, ſcienduin eſt, olim quidem duo genera teſtamentorum in uſu fuiſſe; quorum altero in pace et otio utebantur, quod calatis comitiis appellabant; altero, cum in prælium exituri eſſent, quod procinctum dicebatur. Acceſſit deinde tertium genus teſtamentorum, quod dicebatur per æs et libram, ſcilicet quod per emancipationem, id eſt, imaginariam quandam venditionem agebatur, quinque teſtibus et libripende, civibus Romanis puberibus, præſentibus, et eo, qui familiæ emptor dicebatur. Sed illa quidem priora duo genera teſtamentorum ex veteribus temporibus in deſuetudinem abierunt: quod

vero

vero per æs et libram fiebat, licet diutius permanſerit, attamen partim et hoc in uſu eſſe deſiit.

§ 1. *But, leſt the antient uſage ſhould be forgotten, it is neceſſary to obſerve, that two kinds of teſtaments were formerly in uſe; the one was practiced in times of peace, and named* calatis comitiis; *becauſe it was made in a full aſſembly of the people; and the other was uſed when the people were going forth to battel, and was ſtiled* procinctum teſtamentum. *But a third ſpecies was afterwards added, which was called* per æs et libram, *becauſe it was effected by emancipation, which was an alienation, made by an imaginary ſale in the preſence of five witneſſes, and the* libripens *or ballance-holder, all citizens of* Rome, *above the age of fourteen; and alſo in the preſence of him, who was called the* emptor familiæ *or purchaſer. The two former kinds of teſtaments have been diſuſed for many ages; and that, which was made* per æs et libram, *altho' it continued longer in practice, hath now ceaſed in part to be obſerved.*

Per æs et libram.] *Cujacius* is of opinion, that this ſpecies of teſtaments was abrogated by *Conſtantine*. Cod. 6. t. 23. l. 15.

Attamen partim.] It is ſaid to have ceaſed *in part* only, becauſe the ſame number of witneſſes were ſtill neceſſary; for tho' the civil law required but five, yet the ballance-holder and the purchaſer in reality made ſeven; and it was to ſupply the place of theſe, that the prætorian law added two witneſſes to the number requiſite by the civil law; ſo that in effect both the civil and the prætorian law required the preſence of the ſame number of perſons.

De antiqua teſtandi ratione prætoria.

§ II. Sed prædicta quidem nomina teſtamentorum ad jus civile referebantur: poſtea vero ex edicto prætoris forma alia faciendorum teſtamentorum introducta eſt. Jure etenim honorario nulla mancipatio deſiderabatur, ſed ſeptem teſtium ſigna ſufficiebant: cum jure civili ſigna teſtium non eſſent neceſſaria.

§ 2. *The three kinds of teſtaments before mentioned all took their riſe from the civil law; but afterwards another ſpecies was introduced by the edict of the prætor; for, by the* honorary *or* prætorian *edict, the ſignature of ſeven witneſſes was decreed ſufficient to eſtabliſh a will without any emancipation or imaginary ſale; but this ſignature of witneſſes was not required by the civil law.*

De conjunctione juris civilis et prætorii.

§ III. Sed, cum paulatim, tam ex uſu hominum quam ex conſtitutionum emendationibus, cœpit in unam conſonantiam jus civile et prætorium jungi, conſtitutum eſt, ut, uno eodemque tempore, quod jus civile quodammodo exigebat, ſeptem teſtibus adhibitis, et ſubſcriptione teſtium, quod ex conſtitutionibus inventum eſt, et ex edicto prætoris, ſignacula teſtamentis imponerentur: ita ut hoc jus tripertitum eſſe videatur: et teſtes quidem, eorumque præſentia, uno contextu, teſtamenti celebrandi gratia, à jure civili deſcendant: ſubſcriptiones autem teſtatoris et teſtium ex ſacrarum conſtitutionum obſervatione adhibeantur: ſignacula autem et teſtium numerus ex edicto prætoris.

§ 3. *When the civil and prætorian laws began to be blended together partly by uſage, and partly by the emendation, made by the imperial conſtitutions, it became an eſtabliſhed rule, that all teſtaments ſhould be made at one and the ſame time according to the civil law; that they ſhould be ſealed by ſeven witneſſes according to the prætorian law, and that they ſhould alſo be ſubſcribed by the witneſſes, in obedience to the conſtitutions. Thus the law concerning teſtaments ſeems to be tripartite: for the civil law inforces the neceſſity of having witneſſes to make a teſtament valid, who muſt all be preſent at one and the ſame time without interval; the ſacred conſtitutions ordain, that every teſtament muſt be ſubſcribed by the teſtator and the witneſſes; and the prætorian edict requires ſealing, and fixes the number of witneſſes.*

Quod ex conſtitutionibus.] The ſubſcription of witneſſes was in uſe from the time of the firſt emperors, as appears from *Ulpian*. D. 28. t. 1. *l.* 22. But the ſubſcription of the teſtator was introduced by the following conſtitution of *Theodoſius*. *Hac conſultiſſima lege ſancimus, licere per ſcripturam conficientibus teſtamentum, ſi nullum ſcire volunt ea, quæ in eo ſcripta ſunt, conſignatam, vel ligatam, vel tantum clauſam involutamque proferre ſcripturam, vel ipſius teſtatoris, vel cujuſlibet alterius manu conſcriptam, eamque rogatis teſtibus ſeptem numero, civibus Romanis, puberibus, omnibus ſimul offerre ſignandam et ſubſcribendam: dum tamen teſtibus præſentibus teſtator ſuum eſſe teſtamentum dixerit, quod offertur, eique ipſe coram teſtibus ſua manu in reliqua parte teſtamenti ſubſcripſerit, quo facto, et teſtibus uno eodemque die ac tempore ſubſcribentibus et conſignantibus, teſtamentum valere: nec ideo infirmari, quod teſtes neſciant, quæ in eo ſcripta ſunt teſtamento. Quod ſi literas teſtator ignoret, vel ſubſcribere nequeat, octavo ſubſcriptore pro eo adhibito, eadem ſervari decernimus, &c. &c. &c.* Dat. id. Septemb. Theodoſio A. et Feſto Coſs. 439.—— Cod. 6. t. 23. *l.* 21.

Ex edicto prætoris.] In *England* it is not neceſſary, that the witneſſes to a will ſhould affix their ſeals to it; for, if they ſubſcribe their names, as witneſſes, it is ſufficient. And, when a teſtament diſpoſes only of perſonal eſtate, we follow the canon law, which never requires more than two witneſſes with the miniſter of the pariſh, and in ſome caſes only two witneſſes; *quoniam ſcriptum eſt, in ore duorum vel trium teſtium ſtat omne verbum.* Decret. *Greg.* IX. lib. 3. t. 26. *ll.* 10, 11.—— Nor are even two witneſſes neceſſarily required by the law of *England*, if there are circumſtances to ſupply the want of them. *Cowel's inſt. lib.* 2. *t.* 10. *ſect.* 2.—— And this practice in *England* is not wholly without a precedent, even among the *Romans*—— for the emperors *Theodoſius* and *Valentinian*, by a novel conſtitution, allowed every holograph teſtament to be of full force tho' made without witneſſes. *Si holographa manu teſtamenta condantur, teſtes neceſſarios non putamus. Scripto enim taliter ſufficiet hæredi, aſſerere etiam ſine teſtibus fidem rerum, dummodo reliqua congruere demonſtret, quæ in teſtamentis debere ſervari tam veterum principum quam noſtræ præcipiunt ſanctiones, ut in hæreditariorum corporum poſſeſſionem probata ſcripturæ veritate mittatur. Cum tamen teſtium præſentiam teſtator elegerit, legitimum numerum ſemper oportebit adhiberi.* Novel. *Theod.* lib. 2. tit. 4. In *England* lands and tenements in general are not diviſable by the common law of the realm; they have however been made deviſable by the 32d of *Hen.* the 8th. And, by a ſtatute of the 29th of *Charles* the *ſecond*, it is enacted, "that "all deviſes of lands, deviſable either by the "ſtatute of wills, or by this ſtatute, or by cuſ-"tom, ſhall be in writing, ſigned by the party "deviſing, or by ſome other in his preſence and "by his expreſs direction, and ſhall be atteſted "and ſubſcribed, in the preſence of the deviſor, "by three or four credible witneſſes, or elſe "they ſhall be void.

Solemnitas addita à Juſtiniano.

§ IV. Sed his omnibus à noſtra conſtitutione propter teſtamentorum ſinceritatem, ut nulla fraus adhibeatur, hoc additum eſt, ut, per manus teſtatoris vel teſtium, nomen hæredis exprimatur, et omnia ſecundum illius conſtitutionis tenorem procedent.

§ 4. *To all theſe ſolemnities we have made an addition for the better ſecurity of teſtaments and the prevention of frauds, having enacted by our conſtitution, that the name of the heir ſhall be expreſſed, by the hand-writing either of the teſtator, or of the*

the witneſſes; and that every thing ſhall be done in conformity to the tenor of our ordinance.

A noſtra conſtitutione.] *vid. Cod.* 6. *t.* 23. *l.* 29. *Jubemus. Nov.* 119. *cap.* 9.

De annulis, quibus teſtamenta ſignantur.

§ V. Poſſunt autem omnes teſtes et uno annulo ſignare teſtamentum; (quid enim ſi ſeptem annuli una ſculptura fuerint?) ſecundum quod Papiniano viſum eſt. Sed et alieno quoque annulo licet ſignare teſtamentum.

§ 5. *Every witneſs to a teſtament, according to* Papinian, *may uſe the ſame ſignet: for otherwiſe, what muſt be the conſequence, if ſeven ſeals ſhould happen all to bear the ſame device? It is therefore allowable to ſeal with the ſignet of another.*

Qui teſtes eſſe poſſunt.

§ VI. Teſtes autem adhiberi poſſunt ii, cum quibus teſtamenti factio eſt. Sed neque mulier, neque impubes, neque ſervus, neque furioſus, neque mutus, neque ſurdus, neque is, cui bonis interdictum eſt, neque ii, quos leges jubent improbos inteſtabileſque eſſe, poſſunt in numerum teſtium adhiberi.

§ 6. *Thoſe perſons are allowed to be good witneſſes, who are themſelves legally capable of taking by teſtament: but yet no woman, ſlave, or interdicted prodigal, no perſon under puberty, mad, mute, or deaf, nor any one, whom the laws have reprobated and rendered inteſtable, can be admited a witneſs to a teſtament.*

Sed neque mulier.] Women may be admited witneſſes, by the civil law, in all matters, whether civil or criminal, when the nature of the caſe is ſuch, that other evidence can not be obtained; but, when the choice of witneſſes is altogether voluntary, as in making teſtaments, and doing many other acts, the civil law will not receive the teſtimony of a woman. *Domat. lib.* 3. *t.* 1. The *Romans* had alſo another reaſon for rejecting women as witneſſes to wills; namely, becauſe women were never ſuffered to be preſent at public aſſemblies, where all wills and teſtaments were formerly made. But to uſe the words of *Swinburn*; "whatſoever diverſe do "write, that a woman is not without all excep- "tion, becauſe of the inconſtancy and frailty of "the feminine ſex, whereby they may the ſooner "be corrupted; yet I take it, that their teſti- "mony is ſo good, that a teſtament may be "proved by two women alone, being other- "wiſe without exception. *Swin.* of Teſtaments, "*part.* IV. *ſect.* 24." And, by the laws of *England* in general, women may be witneſſes, ſureties, guardians, *&c.* in all caſes, as well as men.

De ſervo, qui liber exiſtimabatur.

§ VII. Sed, cum aliquis ex teſtibus, teſtamenti quidem faciendi tempore, liber exiſtimabatur, poſtea autem ſervus apparuit, tam Divus Adrianus Catoni quam poſtea Divi Severus et Antoninus reſcripſerunt, ſubvenire ſe ex ſua liberalitate teſtamento, ut ſic habeatur firmum, ac ſi, ut oportebat, factum eſſet; cum, eo tempore, quo teſtamentum ſignaretur, omnium conſenſu hic teſtis liberi loco fuerit, nec quiſquam eſſet, qui ſtatus ei quæſtionem moveret.

§ 7. *If a witneſs, at the time of atteſting, was reputed to have been a free perſon, but afterwards appeared to have been a ſlave at that time, the emperor* Adrian *declared in his reſcript to* Cato, *and afterwards the emperors* Severus *and* Antoninus *by their reſcript decreed in a ſimilar caſe, that they would aid ſuch a defect in a teſta-*

teſtament, and cauſe it to be accounted equally firm, as if it had been made, as it ought; if the witneſs, at the time of ſealing, was, in the eſtimation of all men, taken to be a free perſon, no one having made a queſtion of his condition.

Adrianus Catoni.] *vid. Cod.* 6. *t.* 23. *l.* 1.

De pluribus teſtibus ex eadem domo.

§ VIII. Pater, nec non is, qui in poteſtate ejus eſt; item duo fratres, qui in ejuſdem patris poteſtate ſunt, utique teſtes in uno teſtamento fieri poſſunt: quia nihil nocet, ex una domo plures teſtes alieno negotio adhiberi.

§ 8. *A father and a ſon under his power, or two brothers, under the power of the ſame father, may be made witneſſes to a teſtament: for nothing hinders, but that ſeveral perſons may be admited witneſſes, out of the ſame family, to a buſineſs, in which that family is not intereſted.*

De his, qui ſunt in familia teſtatoris.

§ IX. In teſtibus autem non debet eſſe is, qui in poteſtate teſtatoris eſt. Sed, ſi filiusfamilias de caſtrenſi peculio poſt miſſionem faciat teſtamentum, nec pater ejus recte adhibetur teſtis, nec is, qui in poteſtate ejuſdem patris eſt. Reprobatum eſt enim in ea re domeſticum teſtimonium.

§ 9. *No perſon can be a witneſs to a teſtament, who is under the power of the teſtator. And, if the ſon of a family gives away his military eſtate by teſtament after his diſmiſſion from the army, neither his father nor any one under the power of his father, can be admited a witneſs to it. For, in this caſe, the law does not allow of a domeſtic teſtimony.*

De hærede.

§ X. Sed neque hæres ſcriptus, neque is, qui in ejus poteſtate eſt, neque pater ejus, qui eum habet in poteſtate, neque fratres, qui in ejuſdem patris poteſtate ſunt, teſtes adhiberi poſſunt, quia hoc totum negotium, quod agitur teſtamenti ordinandi gratia, creditur hodie inter teſtatorem et hæredem agi. Licet autem totum jus tale conturbatum fuerat, et veteres quidem familiæ emptorem, et eos, qui per poteſtatem ei conjuncti fuerant, à teſtamentariis teſtimoniis repellebant: hæredi autem, et iis, qui per poteſtatem ei conjuncti fuerant, concedebant teſtimonia in teſtamentis præſtare: licet ii, qui id permittebant, hoc jure minime abuti eos debere ſuadebant: tamen nos eandem obſervationem corrigentes, et quod ab illis ſuaſum eſt, in legis neceſſitatem transferentes, ad imitationem priſtini familiæ emptoris, merito nec hæredi, qui imaginem vetuſtiſſimi familiæ emptoris obtinet, neque aliis perſonis, quæ ei, (ut dictum eſt,) conjunctæ ſunt, licentiam concedimus ſibi quodammodo teſtimonia præſtare: ideoque nec ejuſmodi veteres conſtitutiones noſtro codici inſeri permiſimus.

§ 10.

§ 10. *No heir can be admited a witneſs to that teſtament, by which he is appointed heir; neither can the teſtimony of any one be admited, who is in ſubjection to ſuch heir; nor the teſtimony of his father, to whom he is himſelf under ſubjection; nor the teſtimony of his brothers, if they are under the power of the ſame father: for this whole buſineſs, which is performed for the ſake of completing a teſtament, is now always tranſacted between the teſtator and the real or very heir. But formerly there was great confuſion; for altho' the antients would never admit the teſtimony of the* emptor familiæ, *or the ſuppoſed heir, nor of any one allied to him by ſubjection, yet they admited that of the real heir, and of thoſe, who were connected with him by ſubjection; and the only precaution taken was to exhort and perſuade thoſe perſons not to abuſe their privilege. But we have corrected this practice, preventing by the coercion of law that, which the antient lawyers indeavored to prevent by perſuaſion only: for we permit neither the real heir, who repreſents the* emptor familiæ *of the antients, nor any perſon allied to ſuch real heir, to be a witneſs to the teſtament, by which he was nominated. And it is for this reaſon, that we have not ſuffered the old conſtitutions to be inſerted in our code.*

De legatariis et fideicommiſſariis, et his, qui ſunt in eorum familia.

§ XI. Legatariis autem et fideicommiſſariis, quia non juris ſucceſſores ſunt, et aliis perſonis eis conjunctis, teſtimonium non denegamus: imo in quadam noſtra conſtitutione et hoc ſpecialiter eis conceſſimus. Et multo magis iis, qui in eorum poteſtate ſunt, vel qui eos habent in poteſtate, hujuſmodi licentiam damus.

§ 11. *But we refuſe not the teſtimony of legataries and truſtees, and of thoſe, who are allied to them; becauſe ſuch perſons are not univerſal heirs or ſucceſſors: and, by virtue of our conſtitution, we have even ſpecially granted to all legataries and truſtees the liberty of bearing teſtimony; and therefore we grant this permiſſion much more readily to thoſe, who are in ſubjection to them, and to thoſe, to whom they are ſubject.*

Legatariis autem.] Altho' it was a general rule in the *Roman* law, that no one ſhould be permited to bear teſtimony in his own cauſe, *Cod.* 4. *t.* 20. *l.* 10. yet legataries were allowed to give evidence upon this diſtinction; that they were particular, and not univerſal ſucceſſors; and that a teſtament would be valid without legataries. The difficulty alſo, which muſt frequently have occurred, in obtaining ſo great a number of witneſſes, as ſeven, might probably induce the *Romans* to be leſs ſtrict, as to the perſons, whom they admited upon this occaſion. *Qui teſtamento hæres inſtituitur*, ſays ULPIAN, *in eodem teſtamento teſtis eſſe non poteſt: quod in legatario, et in eo, qui tutor ſcriptus eſt, contra habetur. Hi enim teſtes poſſunt adhiberi, ſi aliud eos nihil impediat.* ff. 28. t. 1. *l.* 20. But by the practice of the eccleſiaſtical courts of this kingdom, which have the ſole cognizance of the validity of all wills as far as they relate to perſonal eſtate, no legatèe, who is a ſubſcribed witneſs to the will, by which he is benefited, can be admited to give his teſtimony *in foro contradictorio*, as to the validity of that will, 'till either the value of his legacy hath been paid to him, or he hath renounced it; and, in caſe of payment, the executor of the ſuppoſed will muſt releaſe all title to any future claim upon ſuch ſuppoſed legatèe, who might otherwiſe be obliged to refund, if the will ſhould be ſet aſide; and a releaſe in this caſe is always made, to the intent, that the legatèe may have no ſhadow of intereſt at the time of making his depoſition. *Swinb.* 397. The ſame practice alſo prevailed at common law in regard to witneſſes, who were benefited under wills, diſpoſing of real eſtate. And, if a legatèe, who was a witneſs to a will, had refuſed either to renounce his legacy, or to be paid a ſum of money in lieu of it, he could not have been compelled by law, to diveſt himſelf of his intereſt; and, whileſt his intereſt continued, his teſtimony was uſeleſs: and this was determined in the caſe of *Anſley* verſ. *Dowſing*, in eaſter-term, 19 *Geo.* 2. the brief ſtate of which caſe was, as follows.

" *James Thompſon*, Eſq. made his will, by which " he diſpoſed of his real eſtate, and gave to one " *John Hailes* and his wife 10 *l.* each for mourn- " ing, and an annuity of 20 *l.* to *Eliz. Hailes*, " the wife of *John*. This will of *James Thomp-* " *ſon* was regularly atteſted, as the ſtatute di- " rects, by three witneſſes, of which number " the above-named *John Hailes* was one; and " he refuſed to be paid 20 *l.* in lieu of his " wife's legacy and his own. The cauſe was " thrice argued at bar, and the judges of the " King's-bench were unanimouſly of opinion, " that a right to deviſe lands is not a com- " mon-law right, but depends upon powers, " given by ſtatutes, the particulars of which are, " that a will of lands muſt be in writing, ſign- " ed and atteſted by three credible witneſſes in " the preſence of the deviſor: that theſe were " checks to prevent men from being impoſed up- " on; and certainly meant, that the witneſſes " to a will, (who are required to be credible) " ſhould not be perſons, who are intituled to " any benefit under that will; and that there- " fore *John Hailes* was not a good witneſs." *Repts. of Sir* John Strange, *p.* 1254.— But this very ſingular caſe, and the unanimous opinions of the judges upon the meaning and intent of the ſtatute of the 29th of *Charles the ſecond*, called the ſtatute of frauds, gave riſe to the following act of parliament, made in the 25th year of *Geo. the ſecond:* by which it is enacted; " that if any " perſon ſhall atteſt the execution of any will " or codicil, which ſhall be made after the " 24th of *June*, 1752, to whom any beneficial " deviſe, legacy, eſtate, intereſt, gift, or ap- " pointment, of or affecting any real or perſonal " eſtate (charges on lands, tenements, or heredi- " taments for payment of debts excepted) ſhall " be thereby given, *&c.* the deviſe ſhall, ſo far " only as concerns ſuch perſon, or any claim- " ing under him be void, and he ſhall be ad- " mited a witneſs to the execution of ſuch will. 25 *Geo.* 2d.

In quadam noſtra conſtitutione.] *Not extant.*

De materia, in qua teſtamenta ſcribuntur.

§ XII. Nihil autem intereſt, teſtamentum in tabulis, an chartis, membraniſve, vel in alia materia fiat.

§ 12. *It is immaterial, whether a teſtament is written upon a tablet of wax, upon paper, parchment, or any other ſubſtance.*

De pluribus codicibus.

§ XIII. Sed et unum teſtamentum pluribus codicibus conficere quis poteſt, ſecundum obtinentem tamen obſervationem omnibus factis: quod interdum etiam neceſſarium eſt; veluti ſi quis navigaturus et ſecum ferre et domi relinquere judiciorum ſuorum conteſtationem velit: vel propter alias innumerabiles cauſas, quæ humanis neceſſitatibus imminent.

§ 13. *Any perſon may commit the ſame teſtament to diverſe tablets, each of which will be an original, if the requiſite forms are obſerved. And this ſometimes is neceſſary; as when a man, who is going a ſea-voyage, is deſirous to carry his will with him, and at the ſame time to leave a counter-part of it at home for his better ſecurity. Innumerable other reaſons for doing this may ariſe, according to the various neceſſities of mankind.*

Propter alias innumerabiles.] Some perſons, for their better ſecurity, have depoſited their own wills in the prerogative office of the archbiſhop of *Canterbury:* and this is certainly a wiſe precaution, againſt either fraud or accidents.

De teſtamento nuncupativo.

§ XIV. Sed hæc quidem de teſtamentis, quæ ſcriptis conficiuntur, ſufficiunt. Si quis autem ſine ſcriptis voluerit ordinare jure civili teſtamentum, ſeptem teſtibus adhibitis, et ſua voluntate coram eis nuncupata, ſciat, hoc perfectiſſimum teſtamentum jure civili firmumque conſtitutum.

§ 14. *What we have already ſaid concerning written teſtaments, is ſufficient. But if any man is willing to diſpoſe of his effects by a nuncupative teſtament*; i. e. *by a teſtament without writing, let him be aſſured, if, in the preſence of ſeven witneſſes, he declares his will by word of mouth, that ſuch verbal declaration will be a complete and valid teſtament according to the civil law.*

Si quis ſine ſcriptis.] Nuncupative teſtaments are certainly the moſt antient, and the great formalities injoined by the civil law, in regard to wills, took their riſe originally from that liberty, which the *Romans* always enjoyed of making teſtaments without writing; for, as it was neceſſary, that the remembrance of the teſtator's will ſhould be preſerved, it was but reaſonable not to ſuffer ſo ſerious an act to be made but in the moſt ſolemn manner. It was ordained by *Theodoſius*, that there ſhould be ſeven witneſſes, citizens of *Rome*, called on purpoſe, and that they ſhould be preſent during the whole time of making a nuncupative teſtament. *Per nuncupationem, hoc eſt, ſine ſcriptura, teſtamenta non alias valere ſancimus, quam ſi ſeptem teſtes ſimul uno eodemque tempore collecti teſtatoris voluntatem, ut teſtamentum ſine ſcriptura facientis, audierint.* Cod. 6. t. 23. *l.* 21. ſect. 2. In *England* it is enacted by 29 *Car.* 2. *cap.* 3. "that no nuncupative will ſhall be good, "where the eſtate bequeathed ſhall exceed the "the value of 30 £, if it is not proved by the "oaths of three witneſſes, who were preſent at "the making; nor unleſs it be proved, that the "teſtator, at the time of pronouncing the ſame, "did bid the perſons preſent, or ſome of them, "bear witneſs, that ſuch was his will, or to that "effect; nor unleſs ſuch nuncupative will were "made in the time of the laſt ſickneſs of the "deceaſed, or in the houſe of his habitation, "or where he hath been reſident ten days next "before the making of ſuch will, except where "ſuch perſon was taken ſick, being from his "own home, and died before his return. And "that, after ſix months paſſed, after the ſpeaking of the pretended teſtamentary words, "no teſtimony ſhall be received to prove any "will nuncupative, except the teſtimony, or "the ſubſtance thereof, were commited to writing within ſix days, after the making of the "will." 29 *Car.* 2. *cap.* 3.

TITULUS UNDECIMUS.

De militari teſtamento.

D. xxix. T. 1. C. vi. T. 21.

In militum teſtamentis ſolemnitates remiſſæ.

SUPRADICTA diligens obſervatio in ordinandis teſtamentis militibus, propter nimiam imperitiam eorum, conſtitutionibus principalibus remiſſa eſt. Nam, quamvis ii neque legitimum numerum teſtium adhibuerint, neque aliam teſtamentorum ſolemnitatem obſervaverint, recte nihilominus teſtantur, videlicet cum in expeditionibus occupati ſunt: quod merito noſtra conſtitutio introduxit. Quoquo enim modo voluntas ejus ſuprema inveniatur, ſive ſcripta, ſive ſine ſcriptura, valet teſtamentum ex voluntate ejus. Illis autem temporibus, per quæ citra expeditionum neceſſitatem in aliis locis, vel ſuis ædibus, degunt, minime ad vindicandum tale privilegium adjuvantur. Sed teſtari quidem, etſi filii-familiarum ſint, propter militiam conceduntur: jure tamen communi, eadem obſervatione et in eorum teſtamentis adhibenda, quam in teſtamentis paganorum proxime expoſuimus.

The beforementioned ſtrict obſervation of formalities, in the conſtruction and formation of teſtaments, is diſpenſed with by the imperial conſtitutions, in regard to all military perſons, on account of their unſkilfulneſs in theſe matters. For, altho' they neither call the legal number of witneſſes, nor obſerve any other ſolemnity, yet they may make a good teſtament, if they are actually upon ſervice againſt an enemy. This was introduced by our own ordinance with good reaſon; and thus, in whatever manner the teſtament of a military perſon is conceived, whether in writing, or not in writing, it prevails according to his intention: but, when ſoldiers are not upon an expedition, and live in their own houſes or elſewhere, they are by no means intituled to claim this privilege; but a ſoldier, who is upon actual ſervice againſt an enemy, may make a teſtament, altho' he is the ſon of a family, and conſequently under power; but, if a ſoldier is willing to make his will according the the common law, he muſt obſerve all the formalities, which are required of others, who are not ſoldiers, when they make their teſtaments.

Quod noſtra conſtitutio.] *vid. Cod.* 6. *t.* 21. *l.* 17.

Reſcriptum Divi Trajani.

§ I. Plane de teſtamentis militum Divus Trajanus Catilio Severo ita reſcripſit. *Id privilegium, quod militantibus datum eſt, ut quoquo modo facta ab his teſtamenta rata ſint, ſic intelligi debet, ut utique prius conſtare debeat, teſtamentum factum eſſe: quod et ſine ſcriptura, et à non militantibus quoque, fieri poteſt. Si ergo miles, de cujus bonis apud te quæritur, convocatis ad hoc hominibus, ut voluntatem ſuam teſtaretur, ita loquutus eſt, ut declararet quem vellet ſibi hæredem eſſe, et cui libertatem tribueret; poteſt videri ſine ſcripto hoc modo eſſe teſtatus, et voluntas ejus rata habenda eſt. Cæterum, ſi (ut plerumque ſermonibus fieri ſolet) dixit alicui,* ego te hæredem facio, *aut,* bona mea tibi relinquo, *non oportet hoc pro teſtamento obſervari. Nec ullorum magis intereſt, quam ipſorum, quibus id privilegium datum eſt, ejuſmodi exemplum non admitti. Alioqui non difficulter poſt mortem alicujus militis teſtes exiſterent, qui affirmarent, ſe audiſſe dicentem aliquem relinquere ſe bona, cui viſum ſit: et per hoc vera judicia ſubverterentur.*

§ 1. *The emperor* Trajan *wrote, as follows, in his reſcript to* Catilius Severus *concerning military teſtaments.* The privilege, which is given to military perſons, that their teſtaments, in whatever manner made, ſhall be valid, muſt be underſtood with this proviſo, that it ought firſt to be apparent, that a teſtament was made in ſome manner: and here obſerve, that a teſtament may be made without writing, even by a perſon, who is not in the army. And therefore, if it appears, that the ſoldier, concerning whoſe goods queſtion is now made before you, did, in the preſence of witneſſes, purpoſely called, declare what perſon ſhould be his heir, and upon what ſlave, or ſlaves, he would confer the benefit of liberty, he ſhall be reputed to have made his teſtament without writing, and his will ſhall be ratified. But, if it is only proved, that he ſaid to ſomebody, as it often happens in diſcourſe, *I appoint you my heir* — or — *I leave you all my eſtate,* ſuch words do not amount to a teſtament. Nor are any perſons more intereſted than the ſoldiery, that words ſo ſpoken ſhould not amount to a will; for, if this was

once

once allowed, witneſſes might without difficulty be produced after the death of any military man, who would affirm, that they had heared him bequeath his eſtate, to whomever they pleaſe; and thus the true intentions of numbers would be defeated.

Trajanus Catilio.] *vid. ff.* 29. *t.* 1. *l.* 24.

De ſurdo et muto.

§ II. Quinimo et mutus et ſurdus miles teſtamentum facere poteſt.

§ 2. *A ſoldier, tho' mute and deaf, may yet make a teſtament.*

Mutus et ſurdus miles.] This was a privilege peculiar to ſoldiers, 'till the reign of *Juſtinian*, who granted this liberty to all his ſubjects in general. *Cod.* 6. *t.* 22. *l.* 10.

De militibus et veteranis.

§ III. Sed hactenus hoc illis à principalibus conſtitutionibus conceditur, quatenus militant et in caſtris tegunt. Poſt miſſionem vero veterani, vel extra caſtra alii, ſi faciant adhuc militantes teſtamentum, communi omnium civium Romanorum jure id facere debent. Et quod in caſtris fecerint teſtamentum non communi jure, ſed quomodo voluerint, poſt miſſionem intra annum tantum valebit. Quid ergo ſi intra annum quis deceſſerit, conditio autem hæredi adſcripta poſt annum extiterit? an quaſi militis teſtamentum valeat? Et placet valere quaſi militis.

§ 3. *The privilege of making teſtaments without the uſual formalities was granted by the imperial conſtitutions to military men, to be enjoyed only during the time of actual ſervice, and whileſt they lived in their tents. For, if veterans after diſmiſſion, or even ſoldiers, if not upon ſervice againſt the enemy, would make their teſtaments, they muſt not omit the forms required to be obſerved in common by all the citizens of* Rome. *And, if a teſtament is made by a ſoldier, even in his tent upon an expedition, yet, if the ſolemnities of the law are not adhered to, ſuch teſtament will continue valid only for one year after his diſmiſſion from the army. Suppoſe therefore, that a ſoldier ſhould die teſtate within a year after his diſmiſſion, and the event of the condition, upon which his heir is inſtituted, ſhould not happen, 'till after the expiration of the year, would the teſtament of ſuch ſoldier be valid? We anſwer, that it would prevail as a military teſtament.*

De facto ante militiam teſtamento.

§ IV. Sed et, ſi quis ante militiam non jure fecit teſtamentum, et miles factus, et in expeditione degens, reſignavit illud, et quædam adjecit ſive detraxit, vel alias manifeſta eſt militis voluntas hoc valere volentis, dicendum eſt, valere hoc teſtamentum, quaſi ex nova militis voluntate.

§ 4. *If a man, before his enterance into the army, ſhould make his teſtament without obſerving the requiſite formalities, and afterwards, when he became a ſoldier, and was upon an expedition, ſhould open his teſtament for the ſake of adding to it, or of ſubſtracting ſomething from it; or if he ſhould cauſe it to appear manifeſtly by any other means, that he was willing that his teſtament ſhould be valid, we pronounce, that it would be valid, by virtue of this new act, amounting to a republication of his will.*

§ V.

De milite arrogato vel emancipato.

§ V. Denique, et ſi in arrogationem datus fuerit miles, vel filius-familias emancipatus eſt, teſtamentum ejus quaſi ex nova militis voluntate valet: nec videtur capitis diminutione irritum fieri.

§ 5. *If a ſoldier is given in arrogation, or, being the ſon of a family, is emancipated, his teſtament is nevertheleſs good, having the ſame effect, as if he had republiſhed it by a new declaration: for it is by no means invalidated by his change of ſtate.*

Capitis diminutione.] From the military privileges it is obſervable, how far the *Romans* found it neceſſary to diſpenſe with the ſtrictneſs of their laws in many caſes. The canon law therefore, with good reaſon, hath reformed this nicety of circumſtantials in regard to wills, and hath reduced the number of ſeven witneſſes to three, (the pariſh prieſt being one,) and in ſome caſes to two witneſſes, returning again to the law of God and the law of nations, by which two witneſſes are ſufficient. But in *England*, where there is not any uſe of ſolemn teſtaments, the ſoldiery ſtand in no need of teſtamentary privileges, for wills of perſonal eſtate are made with all liberty and freedom, according to the *jus gentium*; which requires but two witneſſes; and it is certain and undoubted, "that, if a teſtament was written or "ſubſcribed with the teſtator's own hand, the "teſtimony of witneſſes is not at all neceſſary, "but the proof may be from ſeveral circumſtan-"ces; as that the teſtator was heared to ſay, "that he had made his teſtament; or, if ſuch "teſtament was found in the teſtator's cuſtody, "among his other writings, and papers of con-"ſequence." *Swin. of teſt. part* 1. *ſect.* 10.—*part* 4. *ſect.* 27. But, as it has been before obſerved, "all deviſes of *lands* in *England* muſt be "in *writing*, ſigned by the teſtator, or ſome "other in his preſence, and by his direction, "and muſt be atteſted and ſubſcribed in the "preſence of the teſtator, by three witneſſes at "leaſt, or elſe ſuch deviſes are utterly void." See 29 *Car.* 2. *cap.* 3.

De peculio quaſi caſtrenſi.

§ VI. Sciendum tamen eſt, quod, cum ad exemplum caſtrenſis peculii, tam anteriores leges quam principales conſtitutiones, quibuſdam quaſi caſtrenſia dederant peculia, et horum quibuſdam permiſſum fuerat etiam in poteſtate degentibus teſtari, noſtra conſtitutio, id latius extendens, permiſerit omnibus in hujuſce modi peculiis teſtari quidem, ſed jure communi. Cujus conſtitutionis tenore perſpecto, licentia eſt nihil eorum, quæ ad præfatum jus pertinent, ignorare.

§ 6. *We muſt here make it known, that, ſince the antient laws, as well as the later conſtitutions, have, in imitation of the* peculia caſtrenſia, *or military eſtates, given to ſome perſons* peculia quaſi caſtrenſia, *or* quaſi *military eſtates, and have indulged ſome of theſe in the liberty of making teſtaments, whileſt they were under power, we therefore, extending this privilege ſtill farther, have by our ordinance permited all perſons, who poſſeſs theſe eſtates, to make their teſtaments, on condition, that they obſerve the common ſolemnities of the law. But whoever thoroughly inſpects our conſtitution, will have an opportunity of informing himſelf of every point, which relates to the before-mentioned privilege.*

Cujus conſtitutionis.] *vid. Cod.* 3. *t.* 28. *l.* 37.

TITU-

TITULUS DUODECIMUS.

Quibus non eſt permiſſum facere teſtamentum.

D. xxviii. T. 1. C. vi. T. 22.

De filio-familias.

NON tamen omnibus licet facere teſtamentum: ſtatim enim ii, qui alieno juri ſubjecti ſunt, teſtamenti faciendi jus non habent: adeo quidem ut, quamvis parentes eis permiſerint, nihilo magis jure teſtari poſſint: exceptis iis, quos antea enumeravimus, et præcipue militibus, qui in poteſtate parentum ſunt: quibus de eo, quod in caſtris acquiſiverunt, permiſſum eſt ex conſtitutionibus principum teſtamentum facere. Quod quidem jus ab initio tantum militantibus datum eſt, tam ex auctoritate Divi Auguſti, quam Nervæ, nec non optimi imperatoris Trajani: poſtea vero ſubſcriptione Divi Hadriani etiam dimiſſis à militia, id eſt, veteranis, conceſſum eſt. Itaque, ſiquidem fecerint de caſtrenſi peculio teſtamentum, pertinebit hoc ad eum, quem hæredem reliquerunt: ſi vero inteſtati deceſſerint, nullis liberis vel fratribus ſuperſtitibus, ad parentes eorum jure communi pertinebit. Ex hoc intelligere poſſumus, quod in caſtris acquiſierit miles, qui in poteſtate patris eſt, neque ipſum patrem adimere poſſe, neque patris creditores id vendere, vel aliter inquietare, neque patre mortuo cum fratribus commune eſſe; ſed ſcilicet proprium eſſe ejus, qui id in caſtris acquiſierit: quanquam jure civili omnium, qui in poteſtate parentum ſunt, peculia perinde in bonis parentum computentur, ac ſervorum peculia in bonis dominorum numerantur: exceptis videlicet iis, quæ ex ſacris conſtitutionibus, et præcipue noſtris, propter diverſas cauſas non acquiruntur. Præter hos igitur, qui caſtrenſe peculium vel quaſi caſtrenſe habent, ſi quis alius filius-familias teſtamentum fecerit, inutile eſt; licet ſuæ poteſtatis factus deceſſerit.

The right of making a teſtament with effect is not granted to all perſons alike: for thoſe, who are under the power of others, have not this right: inſomuch that, altho' parents have given permiſſion, their children will not be the more inabled by it to make a teſtament legally valid; if we except ſuch, whom we have already mentioned, and principally thoſe, who, on account of their being in the army, have permiſſion by virtue of our conſtitutions to diſpoſe by teſtament of whatever they have acquired by military ſervice, altho' they are ſtill under the power of their parents. This permiſſion was at firſt granted by Auguſtus, Nerva, *and that excellent prince* Trajan, *to actual ſoldiers only; but afterwards it was extended by the emperor* Adrian *to the veterans, that is, to thoſe, who had received their diſmiſſion: and therefore, if the ſon of a family bequeaths his* caſtrenſian *or military eſtate, it will paſs to him,*

who is inſtituted the heir: but, if ſuch ſon dies inteſtate without children or brothers, his eſtate will then paſs of common right to his father, or other paternal aſcendents. We may from hence infer, that whatever a ſoldier, altho' under power, hath acquired by military ſervice, it can not be taken from him even by his father; and that the creditors of the father can neither ſell it, or otherwiſe diſturb the ſon in his poſſeſſion; and that what is thus acquired is not liable to be ſhared in common with brothers, upon the demiſe of the father; but that it remains the ſole property of him, who acquired it: altho' by the civil law the peculia *or eſtates of thoſe, who are under power, are reckoned among the wealth of their parents; in the ſame manner as the* peculium *of a ſlave is eſteemed the property of his maſter. But thoſe eſtates muſt be excepted, which by the conſtitutions of the emperors, and chiefly by our own, are prohibited for diverſe reaſons to be acquired for parents. Upon the whole, if the ſon of a family, who is neither poſſeſſed of a military or* quaſi-*military eſtate, makes a teſtament, it will not be valid, even altho' he had been emancipated, and became* ſui juris *before his death.*

De impubere et furioſo.

§ I. Præterea teſtamentum facere non poſſunt impuberes; quia nullum eorum animi judicium eſt. Item furioſi; quia mente carent. Nec ad rem pertinet, ſi impubes poſtea pubes, aut furioſus poſtea compos mentis factus fuerit, et deceſſerit. Furioſi autem, ſi per id tempus fecerint teſtamentum, quo furor eorum intermiſſus eſt, jure teſtati eſſe videntur: certe eo, quod ante furorem fecerint, teſtamento valente. Nam neque teſtamentum recte factum, neque ullum aliud negotium recte geſtum, poſtea furor interveniens perimit.

§ 1. *A perſon, within the age of puberty, can by no means make a good teſtament; becauſe he is not ſuppoſed to poſſeſs that judgment of mind, which is requiſite: and the ſame holds true of a madman, inaſmuch as he is deprived of his ſenſes. And the teſtament of a minor under puberty will not become valid, altho' he arrives at puberty before his death; neither will the teſtament of a madman become valid, altho' he afterwards regains his ſenſes, and then dies. But, if he makes his teſtament, during a lucid interval, he is a legal teſtator; ſince it is certain, that the teſtament, which a man hath made, before the malady of madneſs has ſeized upon him, is good: for a ſubſequent fit of phrenzy can neither deſtroy the force of a regular teſtament, nor the validity of any other tranſaction, in which the rules of the law have been punctually obſerved.*

Non poſſunt impuberes.] The rules of the civil law take place in *England*, in regard both to the capacity and incapacity of minors to make wills, as far as thoſe wills relate only to perſonal eſtate: ſo that, if a boy, not arrived at the age of *fourteen*, or a girl, not arrived at the age of *twelve*, makes a will of perſonal eſtate, it will not be good; altho' ſuch boy, or girl, was *doli capax* at the time of making the will, and capable of diſcerning right from wrong: neither will a teſtament, made by a male infant under *fourteen*, or a female under *twelve*, become good, without a republication, altho' ſuch infant ſhould afterwards arrive at the proper age. But it hath been allowed in the caſe of *Hide* and *Hide*, that a male infant of 14, and a female of 12, might make a will of perſonal eſtate; and it was ſaid to have been ſo agreed by lord keeper *Wright*, in the caſe of *Sharpe* and *Sharpe*, in which the court followed the civil law of *Juſtinian*, which permits minors to conſent to marriage at ſuch their reſpective ages. *Gilbert's Repts. page* 74.— *Swinb. fol.* 74. But, in regard to a will of real eſtate, it was enacted in the reign of *Hen.* 8. "that wills or teſtaments made "of any manors, lands, tenements, or other "hereditaments, by any woman covert, or per-"ſon within the age of one and twenty years, "ideot, or inſane, ſhall not be good or effectual "in law." 34 *H.* 8. *cap.* 5. *ſect.* 14.

And

And it hath been adjudged, that, if a minor under twenty-one makes his will, and deviſes his lands, and afterwards attains the full age of twenty-one years, but dies without making any new publication of his will, the will is void. 1 *Sid.* 162. *And.* 182. *Dyer.* 143. *Raym.* 84.

Furioſi autem.] "Mad folks and lunatics, "during the time of their inſanity, can not "make a teſtament nor diſpoſe of any thing by "will, not even to pious uſes. The reaſon is, "becauſe they know not what they do; for, in "making a will, integrity and perfectneſs of "mind, and not health of body, is required: "and thereupon aroſe that common clauſe "uſed in every teſtament; *ſick in body, but* "*of perfect mind and memory.* It was there- "fore determined by the judges, in *Combe*'s caſe "in the *Star-chamber*, (*Moor* 759.) that ſane "memory for making a will is not at all times, "when the party can ſpeak *yea* or *no*, or hath "life in him, nor when he can anſwer to any "thing with ſenſe; but he ought to have judg- "ment to diſcern, and to be of perfect memo- "ry, otherwiſe the will is void. And ſo ſtrong "is this impediment of inſanity, that, if the "teſtator makes his teſtament after this furor "hath overtaken him, and whileſt it as yet poſ- "ſeſſes his mind, albeit the furor afterwards de- "parts, and the teſtator recovers his former "underſtanding, yet doth not the teſtament, "made during his former fit, recover any force "or ſtrength thereby. Howbeit if theſe mad "or lunatic perſons have clear and calm inter- "miſſions, then during the time of ſuch their "freedom of mind, they may make their teſta- "ments; ſo that neither the *furor* going before, "nor following the making of the teſtament, "doth hinder the ſame begun and finiſhed in "the mean time." *Swinburn of teſt. part 2. ſect.* 3. *Cod.* 6. *t.* 22. *l.* 9.

De prodigo.

§ II. Item prodigus, cui bonorum ſuorum adminiſtratio interdicta eſt, teſtamentum facere non poteſt: ſed id, quod ante fecerit, quam interdictio bonorum ſuorum ei fiat, ratum eſt.

§ 2. *A prodigal alſo, who is under an interdiction, and prohibited from having the management of his own affairs, can not make a teſtament: but, if he hath bequeathed his eſtate before interdiction, his teſtament will be valid.*

Item prodigus.] The laws of *England* take no care of prodigals.

De ſurdo aut muto.

§ III. Item ſurdus et mutus non ſemper teſtamentum facere poſſunt. Utique autem de eo ſurdo loquimur, qui omnino non exaudit, non qui tarde exaudit. Nam et mutus is intelligitur, qui eloqui nihil poteſt, non qui tarde loquitur. Sæpe enim etiam literati homines variis caſibus et audiendi et loquendi facultatem amittunt. Unde noſtra conſtitutio etiam his ſubvenit, ut, certis caſibus et modis, ſecundum normam ejus poſſint teſtari, aliaque facere, quæ eis permiſſa ſunt. Sed, ſi quis poſt teſtamentum factum, adverſa valetudine aut quolibet alio caſu mutus aut ſurdus eſſe cœperit, ratum nihilominus manet ejus teſtamentum.

§ 3. *A man deaf and dumb is not always capable of making a teſtament: but we would be underſtood to mean this of him, who is ſo deaf as to be unable to hear at all, and not of him, who is afflicted only with a thickneſs of hearing; and of him, who is ſo dumb, as to be totally deprived of utterance, and not of him, who only labors under a difficulty of ſpeech: for it often happens, that the moſt literate perſons loſe the faculty of hearing and ſpeaking by various misfortunes; we have therefore publiſhed a conſtitution, which aids all ſuch perſons; ſo that in certain caſes they may make teſtaments, if they obſerve the rules of our ordinance, and may do many other acts, which are there permited. But, if any man, after making his teſtament, becomes either deaf or mute by reaſon of ill health or any other accident, his teſtament will notwithſtanding this remain good.*

Unde noſtra conſtitutio.] *vid. Cod* 6. *t.* 22.. *l.* 10.

De cæco.

§ IV. Cœcus autem non poteſt facere teſtamentum, niſi per obſervationem, quam lex Divi Juſtini patris noſtri introduxit.

§ 4. *A blind man is not allowed to have the power of making a teſtament, unleſs he obſerves thoſe rules, which the law of the emperor* Juſtin, *our father, has introduced.*

Cœcus autem.] "He, who is blind, may make "a nuncupative teſtament, by declaring his will "before a ſufficient number of witneſſes; but "he can not make his teſtament in writing, un-"leſs the ſame be read before witneſſes, and in "their preſence acknowledged by the teſtator "for his laſt will. And therefore, if a writing "were delivered to the teſtator, and he, not hear-"ing the ſame read, acknowledged it for his "will, this would not be ſufficient; for it may "be, that, if he ſhould hear the ſame, he would "not own it." *Swin. part 2. ſect.* 11.

De eo, qui eſt apud hoſtes.

§ V. Ejus, qui apud hoſtes eſt, teſtamentum, quod ibi fecit, non valet, quamvis redierit: ſed quod, dum in civitate fuerat, fecit, ſive redierit, valet jure poſtliminii; ſive illic deceſſerit, valet ex lege Cornelia.

§ 5. *The teſtament of him, who is in the hands of an enemy, is not valid, if it was made during his captivity; even altho' he lives to return. But a teſtament, made by a man in the city, or before captivity, is good, either by virtue of the* jus poſtliminii, *if the priſoner returns; or by virtue of the law* Cornelia, *if he dies a captive.*

Ex lege Cornelia.] "Quo tempore, aut quo auctore, lata ſit, non liquet. *Vinn.*

TITULUS DECIMUS-TERTIUS.

De exhæredatione liberorum.

D. xxviii. T. 2. C. vi. T. 28, 29. Nov. 115.

Jus vetus de liberis in poteſtate.

NON tamen, ut omnino valeat teſtamentum, ſufficit hæc obſervatio, quam ſupra expoſuimus: ſed, qui filium in poteſtate habet, curare debet, ut eum hæredem inſtituat, vel exhæredem eum nominatim faciat. Alioqui, ſi eum ſilentio præterierit, inutiliter teſtabitur: adeo quidem ut, ſi vivo patre filius mortuus ſit, nemo hæres ex eo teſtamento exiſtere poſſit: quia ſcilicet ab initio non conſtiterit teſtamentum. Sed non ita de filiabus, et aliis per virilem ſexum deſcendentibus liberis utriuſque ſexus, antiquitati fuerat obſervatum: ſed, ſi non fuerant ſcripti hæredes ſcriptæve, vel exhæredati exhæredatæve, teſtamentum quidem non infirmabatur, jus tamen accreſcendi eis ad certam portionem præſtabatur. Sed nec nominatim eas perſonas exhæredare parentibus neceſſe erat, ſed licebat inter cæteros

teros hoc facere. Nominatim autem quis exhæredari videtur, ſive ita exhæredetur, *Titius filius meus exhæres eſto*; ſive ita, *filius meus exhæres eſto*, non adjecto proprio nomine; ſcilicet, ſi alius filius non extet.

The ſolemnities of law, which we have before explained, are not alone ſufficient to make a teſtament valid. For he, who has a ſon under his power, ſhould take care either to inſtitute him his heir, or to diſinherit him nominally: for, if a father in his teſtament, pretermits or paſſes over his ſon in ſilence, the teſtament will have no effect. And even if the ſon dies, living the father, yet no one can take upon himſelf the heirſhip by virtue of that teſtament, inaſmuch as it was null from the very beginning. But the antients did not obſerve this rule in regard to daughters and grand-children of either ſex, tho' deſcended from the male line; for altho' theſe were neither inſtituted heirs, nor diſinherited, yet the teſtament was not invaliditated; becauſe a right of accretion intituled them to a certain portion of the inheritance: parents were therefore not neceſſitated to diſinherit theſe children nominally, but might do it inter cæteros. *A child is nominally diſinherited, if the words of the will are,* let Titius my ſon be diſinherited; *or even thus*—— let my ſon be diſinherited, *without the addition of any proper name, on ſuppoſition, that the teſtator had no other ſon living.*

Sed qui filium.] "In *England* the liberty of a "teſtator is ſo large and ample, that altho' he "hath children of his own, naturally and law- "fully begotten, yet, by the laws and cuſtoms "of this realm, he may appoint others to be his "heirs or executors, ſecretly omiting or openly excluding his own children." *Swin. part* 5. *ſect.* 1.

De poſthumis.

§ I. Poſthumi quoque liberi vel hæredes inſtitui debent vel exhæredari. Et in eo par omnium conditio eſt, quod et filio poſthumo, et quolibet ex cæteris liberis, ſive feminini ſexus ſive maſculini, præterito, valet quidem teſtamentum, ſed poſtea, agnatione poſthumi ſive poſthumæ, rumpitur, et ea ratione totum infirmatur. Ideoque, ſi mulier, ex qua poſthumus aut poſthuma ſperabatur, abortum fecerit, nihil impedimento eſt ſcriptis hæredibus ad hæreditatem adeundam. Sed fœminini quidem ſexus perſonæ vel nominatim vel inter cæteros exhæredari ſolebant: dum tamen, ſi inter cæteros exhæredarentur, aliquid eis legaretur, ne viderentur præteritæ eſſe per oblivionem. Maſculos vero poſthumos, id eſt, filios et deinceps, placuit non aliter recte exhæredari, niſi nominatim exhæredarentur, hoc ſcilicet modo, *quicunque mihi filius genitus fuerit, exhæres eſto.*

§ 1. *Alſo poſthumous children ſhould either be inſtituted heirs, or diſinherited: and in this the condition of all children is equal: but, if a poſthumous ſon, or any poſthumous deſcendent in the right line, whether male or female, is pretermited in a teſtament, ſuch teſtament will nevertheleſs be valid at the time of making; but, by the ſubſequent birth of a child of either ſex, it will be annulled. And therefore, if a matron, from whom there is reaſon to expect a poſthumous child, ſhould miſcarry, nothing can prevent the written heirs from entering upon the inheritance. But female poſthumous children may be either nominally diſinherited,* or inter cæteros *by a general clauſe: yet, if they are diſinherited* inter cæteros, *ſomething muſt be left them to ſhew, that they were not omited thro' forgetfulneſs. But male poſthumous children,* i. e. *ſons, and their deſcendents in the direct line, can not be diſinherited otherwiſe, than*

nominally

nominally in this form—— whatever ſon is hereafter born to me, I diſinherit him.

Agnatione poſthumi.] The rights of poſthumous children ſeem to be regulated by the rights of thoſe, who are born in the life-time of their parents. Thus the civil law permits the birth of a poſthumous child to annul a teſtament; becauſe it is by that law in the power of any child, who hath been either omited in his father's teſtament, or diſinherited nominally without cauſe, to ſet that teſtament aſide; and where preterition is a ſufficient reaſon to deſtroy a will, at the inſtance of a child born in the life-time of his father, it would be extremely hard not to allow this reaſon at leaſt an equal force in regard to a poſthumous child. But by the law of *England* the birth of a poſthumous child does not affect the teſtament of the father in any degree; which is in appearance a very rigid doctrine: but with us the teſtament of a parent can not be annulled on account of the preterition, or cauſeleſs diſinheriſon of a child, born in his life-time; for the law permits every man to diſpoſe of his own fortune, as he pleaſes: and therefore, if a poſthumous child was allowed to annul a will, it muſt follow, that ſuch child would have a greater right, than if he had been born in his father's life-time; namely, the right of annulling his father's will on account of preterition. And, if the law was to perſue a middle way, and admit a poſthumous child to take a ſhare of the deceaſed's eſtate without annulling the whole teſtament, this would be in effect to make a new will for the deceaſed, and to remedy a leſs evil by the introduction of a greater, in countenancing a practice ſo very dangerous, and contrary to that eſtabliſhed rule of law, which gives every man an uncontrouled power in the diſpoſition of his own fortune. What has been here ſaid is intended only in regard to wills of perſonal eſtate; for, in reſpect to wills of real eſtate, there are, beſides the ſtatute of frauds, many other reaſons, which might be urged to evince, that the birth of a poſthumous child can not be allowed to operate as a revocation.

De quaſi poſthumis.

§ II. Poſthumorum autem loco ſunt et hi, qui in ſui hæredis locum ſuccedendo, quaſi agnaſcendo, fiunt parentibus ſui hæredes: ut ecce, ſi quis filium, et ex eo nepotem neptemve, in poteſtate habeat, quia filius gradu præcedit, is ſolus jura ſui hæredis habet; quamvis nepos quoque et neptis ex eo in eadem poteſtate ſint. Sed, ſi filius ejus vivo eo moriatur, aut qualibet alia ratione exeat de poteſtate ejus, incipit nepos neptiſve in ejus locum ſuccedere, et eo modo jura ſuorum hæredum quaſi agnatione nanciſcitur. Ne ergo eo modo rumpatur ejus teſtamentum, ſicut ipſum filium vel hæredem inſtituere vel nominatim exhæredare debet, ne non jure faciat teſtamentum; ita et nepotem neptemve ex filio neceſſe eſt ei vel hæredem inſtituere vel exhæredare, ne forte eo vivo, filio mortuo, ſuccedendo in locum ejus nepos, neptiſve, quaſi agnaſcendo, rumpat teſtamentum. Idque lege Julia Velleia proviſum eſt: in qua ſimilis exhæredationis modus ad ſimilitudinem poſthumorum demonſtratur.

§ 2. *Thoſe alſo are reckoned in the place of poſthumous children, who, ſucceeding in the ſtead of proper heirs, become, by a* quaſi-*birth, proper heirs to their parents: for example, if* Titius *has a ſon under his power, and by him a grandſon, or grand-daughter, then would the ſon, becauſe he is firſt in degree, have the ſole right of a proper heir, altho' the grandſon, or grand-daughter by that ſon, is under the ſame parental power. But, if the ſon of* Titius *ſhould die in his father's life-time, or ſhould by any other means ceaſe to be under his father's power, the grandſon or grand-daughter would ſucceed in his place, and would thus, by what may be called a* quaſi-*birth, obtain the right of a proper heir. Therefore, as it behoves a teſtator for his own ſecurity, either to inſtitute or diſinherit his ſon, leſt his teſtament ſhould be deemed not legal, ſo it is equally neceſſary for him either to inſtitute or diſ-*

inherit

inherit his grandſon or grand-daughter by that ſon, leſt, if his ſon ſhould die in his (the teſtator's) life-time, his grandſon or grand-daughter, ſucceeding to the place of his ſon, ſhould make void his teſtament by a quaſi-*agnation. And this has been introduced by the law* Julia Velleia, *in which is ſet forth a form of diſinheriting* quaſi-*poſthumous children, ſimilar to that of diſinheriting poſthumous children.*

Lege Julia Velleia.] *vid. ff.* 28. *t.* 2. *l.* 29. Gallus *ſic poſſe inſtitui poſthumos nepotes induxit,* &c.

De emancipatis.

§ III. Emancipatos liberos jure civili neque hæredes inſtituere, neque exhæredare, neceſſe eſt: quia non ſunt ſui hæredes. Sed prætor omnes, tam fœminini ſexus quam maſculini, ſi hæredes non inſtituantur, exhæredari jubet; virilis ſexus nominatim, fœminini vero inter cæteros: quia, ſi neque hæredes inſtituti fuerunt, neque ita (ut diximus) exhæredati, promittit eis prætor contra tabulas teſtamenti bonorum poſſeſſionem.

§ 3. *In regard to emancipated children, the* civil law *does not make it neceſſary, either to inſtitute them heirs or to diſinherit them in a teſtament; inaſmuch as they are not* ſui hæredes, *i. e. proper heirs. But the prætor commands, that all children in general, whether male or female, if they are not inſtituted heirs, ſhall be diſinherited; the males nominally; the females* inter cæteros: *for, if children have neither been inſtituted heirs, nor properly diſinherited in the manner, which we have mentioned, the prætor gives them the poſſeſſion of the goods, contrary to the diſpoſition of the teſtament.*

De adoptivis.

§ IV. Adoptivi liberi, quamdiu ſunt in poteſtate patris adoptivi, ejuſdem juris habentur, cujus ſunt juſtis nuptiis quæſiti: itaque hæredes inſtituendi vel exhæredandi ſunt, ſecundum ea, quæ de naturalibus expoſuimus. Emancipati vero à patre adoptivo neque juri civili, neque eo jure, quod ad edictum prætoris attinet, inter liberos connumerantur. Qua ratione accidit, ut ex diverſo, quod ad naturalem parentem attinet, quamdiu quidem ſunt in adoptiva familia, extraneorum numero habeantur, ut eos neque hæredes inſtituere, neque exhæredare, neceſſe ſit: cum vero emancipati fuerint ab adoptivo patre, tunc incipiant in ea cauſa eſſe, in qua futuri eſſent, ſi à naturali patre emancipati fuiſſent.

§ 4. *Adopted children, as long as they continue under the power of their adoptive father, are intituled to the ſame rights, as children born in lawful matrimony: and therefore they muſt either be inſtituted heirs, or diſinherited, according to the rules laid down in regard to natural and lawful children. But it is neither enacted by the civil law, nor injoined by prætorian equity, that children, emancipated by an adoptive father, ſhould be numbered among his natural children, ſo as to partake of their rights: whence it happens, that adopted children, as long as they continue in adoption, are reputed ſtrangers to their natural parents, who are not neceſſitated either to inſtitute them heirs, or to diſinherit them: but, when they are emancipated by their adoptive father, they are then in the ſame ſtate, in which they would have been, if they had been emancipated by their natural father.*

§ V.

Jus novum.

§ V. Sed hæc quidem vetuſtas introducebat. Noſtra vero conſtitutio, inter maſculos et fœminas in hoc jure nihil intereſſe exiſtimans, quia utraque perſona in hominum procreatione ſimili naturæ officio fungitur, et lege antiqua duodecim tabularum omnes ſimpliciter ad ſucceſſionem ab inteſtato vocabantur, quod et prætores poſtea ſequuti eſſe videntur, ideo ſimplex ac ſimile jus, et in filiis et in filiabus et in cæteris deſcendentibus per virilem ſexum perſonis, non ſolum jam natis, ſed etiam poſthumis, introduxit; ut omnes, ſive ſui ſive emancipati ſint, vel hæredes inſtituantur, vel nominatim exhæredentur: et eundem habeant effectum circa teſtamenta parentum ſuorum infirmanda, et hæreditatem auferendam, quem filii ſui vel emancipati habent, ſive jam nati ſint, ſive adhuc in utero conſtituti, poſtea nati ſint. Circa adoptivos autem filios certam induximus diviſionem, quæ in noſtra conſtitutione, quam ſuper adoptivis tulimus, continetur.

§ 5. *Theſe were the rules, which the antient lawyers introduced. But we (not thinking, that any diſtinction can reaſonably be made between the two ſexes, inaſmuch as they both contribute alike to the procreation of the ſpecies, and becauſe, by the antient law of the twelve tables, all children, male as well as female, were equally called to the ſucceſſion* ab inteſtato, *which law the prætors ſeem afterwards to have followed) have by our conſtitution introduced the ſame law in regard both to ſons and daughters, and to all the other deſcendents in the male line, whether in being, or poſthumous: ſo that all children, whether they are proper heirs or emancipated, muſt either be inſtituted heirs or nominally diſinherited. And, in regard to adopted children, we have introduced certain regulations, which are contained in our conſtitution of adoptions.*

Noſtra vero conſtitutio.] *vid. Cod.* 6. *t.* 28. *l.* 4.

In noſtra conſtitutione.] *vid. Cod.* 8. *t.* 48. *l.* 10. *cum in adoptivis.*

De teſtamento militis.

§ VI. Sed, ſi in expeditione occupatus miles teſtamentum faciat, et liberos ſuos jam natos vel poſthumos nominatim non exhæredaverit, ſed ſilentio præterierit, non ignorans, an habeat liberos, ſilentium ejus pro exhæredatione nominatim facta valere, conſtitutionibus principum cautum eſt.

§ 6. *If a ſoldier makes his teſtament, whileſt he is upon a military expedition, and neither nominally diſinherits his children already born, nor his poſthumous children, but paſſes them over in ſilence, altho' it is known to him, that he has ſuch children, or that his wife was enſient, it is provided by the conſtitutions of the emperors, that ſuch ſilence ſhall be of equal force with a nominal diſinheriſon.*

De teſtamento matris, aut avi materni.

§ VII. Mater vel avus maternus neceſſe non habent liberos ſuos aut hæredes inſtituere, aut exhæredare, ſed poſſunt eos ſilentio omittere: nam ſilentium matris aut avi materni, et cæterorum per matrem aſcendentium, tantum

tantum facit, quantum exhæredatio patris. Neque enim matri filium filiamve, neque avo materno nepotem neptemve ex filia, ſi eum eamve hæredem non inſtituat, exhæredare neceſſe eſt, ſive de jure civili quæramus, ſive de edicto prætoris, quo prætor præteritis liberis contra tabulas bonorum poſſeſſionem promittit: ſed aliud eis adminiculum ſervatur, quod paulo poſt vobis manifeſtum fiet.

§ 7. *Neither a mother, nor a grandfather on the mother's ſide, is under any neceſſity of either inſtituting their children heirs, or of diſinheriting them, but may paſs them by in ſilence; for the ſilence of a mother, a maternal grandfather, and of all other aſcendents on the mother's ſide, works the ſame effect, as an actual diſinheriſon by a father. For a mother is not obliged to diſinherit her children, if ſhe does not think proper to inſtitute them her heirs; neither is a maternal grandfather under a neceſſity either of inſtituting or diſinheriting his grandſon or grand-daughter by a daughter; inaſmuch as this is not required either by the civil law, or the* edict *of the prætor, which gives the poſſeſſion of goods* contra tabulas (*i. e. contrary to the diſpoſition of the teſtament) to thoſe children, who have been paſſed over in ſilence. But children, in this caſe, are not without a remedy againſt the teſtament of their mother or maternal grandfather, which ſhall be ſhewed hereafter.*

TITULUS DECIMUS-QUARTUS.

De hæredibus inſtituendis.

D. xxviii. T. 5. C. vi. T. 24.

Qui poſſunt hæredes inſtitui.

HÆREDES inſtituere permiſſum eſt tam liberos homines quam ſervos; et tam proprios, quam alienos. Proprios autem olim quidem ſecundum plurium ſententias non aliter, quam cum libertate, recte inſtituere licebat: hodie vero etiam ſine libertate ex noſtra conſtitutione eos hæredes inſtituere permiſſum eſt. Quod non per innovationem induximus, ſed quoniam æquius erat, et Atilicino placuiſſe Paulus ſuis libris, quos tam ad Maſurium Sabinum quam ad Plautium ſcripſit, refert. Proprius autem ſervus etiam is intelligitur, in quo nudam proprietatem teſtator habet, alio uſumfructum habente. Eſt tamen caſus, in quo nec cum libertate utiliter ſervus à domina hæres inſtituitur, ut conſtitutione Divorum Severi et Antonini cavetur. Cujus verba hæc ſunt: *ſervum, adulterio maculatum, non jure teſtamento manumiſſum ante ſententiam ab ea muliere videri, quæ rea fuerat ejuſdem criminis poſtulata, rationis eſt. Quare ſequitur, ut, in eundem à domina collata, hæredis inſtitutio nullius momenti habeatur.* Alienus ſervus etiam is intelligitur, in quo uſumfructum teſtator habet.

A man may appoint ſlaves, as well as freemen, to be his heirs by teſtament; and may nominate the ſlaves of another as well as his own: yet, according to the opinion of many, no maſter could formerly inſtitute his own ſlaves to be his heirs, without giving them their liberty: but at preſent, by virtue of our conſtitution, maſters may appoint their ſlaves to be their heirs, without making even any mention of liberty: and this we have introduced, not for the ſake of innovation, but becauſe it ſeemed moſt juſt; and becauſe Paulus, *in his commentaries upon* Sabinus *and* Plautius, *affirms, that this was alſo the opinion of* Atilicinus. *Here note, that we call a ſlave* proprius ſervus, *if the teſtator had only a nude property in him, the uſufruct being in another. But, in a conſtitution of the emperors* Severus *and* Antoninus, *there is a caſe, in which a ſlave was not permited to be inſtituted an heir by his owner, altho' his liberty was expreſsly given to him. The words of the conſtitution are theſe*——
It is conſonant to right reaſon, that no ſlave, accuſed of adultery with his miſtreſs, ſhall be allowed, before a ſentence of acquital, to be made free by that miſtreſs, who is alleged to be a partener in the crime. *It therefore follows, that, if a miſtreſs inſtitutes ſuch a ſlave to be her heir, the inſtitution is of no avail.*—— *The expreſſion* alienus ſervus *(i. e.* the ſlave of another,*) is alſo ſometimes uſed to denote him, of whom the teſtator had the uſufruct, tho' not the property.*

Ex noſtra conſtitutione.] *vid. Cod.* 6. *t.* 27. *l.* 5.

Si ſervus hæres inſtitutus in eadem cauſa manſerit, vel non.

§ I. Servus autem à domino ſuo hæres inſtitutus, ſiquidem in eadem cauſa manſerit, fit ex teſtamento liber, hæreſque ei neceſſarius. Si vero à vivo teſtatore manumiſſus fuerit, ſuo arbitrio adire hæreditatem poteſt; quia non fit hæres neceſſarius, cum utrumque ex domini teſtamento non conſequatur. Quod ſi alienatus fuerit, juſſu novi domini adire hæreditatem debet, et ea ratione per eum dominus fit hæres: nam ipſe alienatus neque liber, neque hæres, eſſe poteſt; etiamſi cum libertate hæres inſtitutus fuerit: deſtitiſſe enim à libertatis datione videtur dominus, qui eum alienavit. Alienus quoque ſervus hæres inſtitutus, ſi in eadem cauſa duraverit, juſſu ejus domini adire hæreditatem debet. Si vero alienatus fuerit ab eo, aut vivo teſtatore, aut poſt mortem ejus, antequam adeat, debet juſſu novi domini adire. At, ſi manumiſſus eſt vivo teſtatore, vel mortuo, antequam adeat, ſuo arbitrio adire poteſt hæreditatem.

§ 1. *When a ſlave hath been inſtituted by his maſter, and remains in the ſame ſtate, he will obtain his freedom at the death of his maſter, by virtue of the teſtament, and become his neceſſary heir. But, if that ſlave is manumited in the life-time of his maſter, it is in his power either to accept or refuſe the inheritance; for he will not become a neceſſary heir, as he can not be ſaid to have obtained both his liberty and the inheritance, by virtue of the teſtament. But, if ſuch inſtituted heir ſhould be aliened, he can not then enter upon the inheritance but at the command of his new maſter, who by means of his ſlave may become the heir of the teſtator. For a ſlave, who hath been aliened, can not afterwards obtain his liberty, or take an inheritance to his own uſe, by virtue of the teſtament of that maſter, who made the alienation, altho' his freedom*

was

was expreſsly given by ſuch teſtament; becauſe a maſter, who has aliened his ſlave, ſeems to have departed from having any intention to infranchiſe him. And, when the ſlave of another is appointed an heir, but remains in the ſame condition, he can not take the inheritance, but by his maſter's order: and, if the ſlave is aliened in the life-time of the teſtator, or even after his death, at any time before he has actually taken the inheritance, he muſt then either accept, or refuſe it, at the command of his new maſter. But, if the ſlave is infranchiſed, living the teſtator, or after his death, before he has accepted the heirſhip, he either may, or may not, enter upon the inheritance at his own option.

De ſervo hæreditario.

§ II. Servus etiam alienus poſt domini mortem recte hæres inſtituitur: quia et cum hæreditariis ſervis teſtamenti factio eſt. Nondum enim adita hæreditas perſonæ vicem ſuſtinet non hæredis futuri, ſed defuncti: cum etiam ejus, qui in utero eſt, ſervus recte hæres inſtituatur.

§ 2. *The ſlave of another may legally be inſtituted an heir, after the death of his maſter; for the ſlaves of an inheritance, not entered upon, are intituled to the* factio paſſiva teſtamenti, *i. e. are capable of taking, tho' not of giving, by teſtament: and the reaſon of this is, becauſe an inheritance, which is open, and not as yet entered upon, is ſuppoſed to repreſent the perſon of the deceaſed, and not the perſon of the future heir: and thus the ſlave even of a child in the womb may be conſtituted an heir.*

De ſervo pluriium.

§ III. Servus autem plurium, cum quibus teſtamenti factio eſt, ab extraneo inſtitutus hæres, unicuique dominorum, cujus juſſu adierit, pro portione dominii acquirit hæreditatem.

§ 3. *If the ſlave of many maſters, who are all capable of taking by teſtament, is inſtituted an heir by a ſtranger, then that ſlave acquires a part of the inheritance for each maſter, who commanded him to take it, according to their ſeveral proportions of property.*

De numero hæredum.

§ IV. Et unum hominem, et plures, uſque in infinitum, quot quis hæredes velit, facere licet.

§ 4. *A teſtator may appoint one heir, or as many heirs as he pleaſes* in infinitum.

De diviſione hæreditatis.

§ V. Hæreditas plerumque dividitur in duodecim uncias; quæ aſſis appellatione continentur. Habent autem et hæ partes propria nomina ab uncia uſque ad aſſem; ut puta hæc, ſextans, quadrans, triens, quincunx, ſemis, ſeptunx, bes, dodrans, dextans, deunx. Non autem utique ſemper duodecim uncias eſſe oportet: nam tot unciæ aſſem efficiunt, quot teſtator voluerit: et, ſi unum tantum quis ex ſemiſſe (verbi gratia) hæredem ſcripſerit, totus as in ſemiſſe erit. Neque enim idem ex parte teſtatus, et ex parte inteſtatus, decedere poteſt, niſi ſit miles, cujus ſola volun-

tas in teſtando ſpectatur. Et è contrario poteſt quis in quantaſcunque voluerit plurimas uncias ſuam hæreditatem dividere.

§ 5. *An inheritance is generally divided into twelve* unciæ, *that is, parts or ounces, all which are comprehended under one total, termed an* As: *and each of theſe parts, from the* uncia *to the* As, *has its peculiar name; viz.*

Sextans—— *a ſixth part, or two ounces.*
Quadrans—— *a fourth, or three ounces.*
Triens—— *a third, or four ounces.*
Quincunx—— *five ounces.*
Semis—— *a moity, or ſix ounces.*
Septunx—— *ſeven ounces.*
Bes—— *two thirds, or* 8 *ounces*; quaſi, bis triens.
Dodrans—— *nine ounces, or three fourths*; quaſi, dempto quadrante, As.
Dextans—— *ten ounces*; quaſi, dempto ſextante, As.
Deunx—— *eleven ounces out of twelve*; quaſi, demptâ unciâ, As.

But it is not neceſſary, that an As, *or* total, *ſhould always be divided into twelve parts; for an* As *may conſiſt of what parts the teſtator pleaſes; and, if a man names but one heir, and appoints him* ex ſemiſſe, i. e. *the heir of ſix parts; yet the whole* As *will be included; for no man can die partly teſtate and partly inteſtate, except a ſoldier, whoſe intention is ſolely to be regarded. And a teſtator may alſo divide his eſtate into as many parts, as he thinks convenient.*

Ex parte teſtatus, et ex parte inteſtatus.] In *England*, if a man diſpoſes of only the half of his perſonal eſtate by teſtament, he will nevertheleſs die inteſtate, as to the other half, which will be diſpoſed of among his next of kin, as the ſtatute of diſtributions directs.

De portionibus ſingulorum hæredum. Si teſtator aſſem non diviſerit, aut partes in quorundam perſona non ultra aſſem expreſſerit.

§ VI. Si plures inſtituantur hæredes, ita demum in hoc caſu partium diſtributio neceſſaria eſt, ſi nolit teſtator, eos ex æquis partibus hæredes eſſe. Satis enim conſtat, nullis partibus nominatis, ex æquis partibus eos hæredes eſſe. Partibus autem in quorundam perſonis expreſſis, ſi quis alius ſine parte nominatus erit, ſiquidem aliqua pars aſſi deerit, ex ea parte hæres fit. Et, ſi plures ſine parte ſcripti ſunt, omnes in eandem partem concurrunt. Si vero totus as completus ſit, ii, qui nominatim expreſſas partes habent, in dimidiam partem vocantur, et ille, vel illi omnes, in alteram dimidiam. Nec intereſt, primus an medius, an noviſſimus, ſine parte hæres ſcriptus ſit: ea enim pars data intelligitur, quæ vacat.

§ 6. *When a teſtator hath inſtituted many heirs, it is incumbent upon him to make a diviſion of his effects, if he does not intend, that all his heirs ſhould ſhare his inheritance in equal portions: for, if no diſtribution is made by the teſtator, it is evident, that all his heirs muſt be equal ſharers. But, if the ſhares of ſome of the nominated heirs in a teſtament ſhould be expreſſed, and the ſhare or ſhares of one or more ſhould*

be

be omited, then he or they, whoſe ſhare or ſhares had not been ſpecified, would be intituled to the undiſpoſed remainder of the inheritance. But, if a whole As, *or inheritance, is given among ſome of the nominated heirs, yet they, whoſe ſhares are mentioned, are intituled only to a moity; and he or they, whoſe ſhares are not mentioned, are called to the ſucceſſion of the other moity. And, when a whole inheritance is not given away, it is immaterial whether an heir, whoſe ſhare is not ſpecified, holds the firſt, middle, or laſt place in the nomination: for, whatever place he holds in it, he is equally intituled to the part not bequeathed in the teſtament.*

In alteram dimidiam.] "Semis illi, vel illis, "qui ſine parte inſtituti ſunt, dabitur; quaſi "videatur teſtator, ex viginti quatuor unciis, "hæredes inſtituiſſe." *Theoph.*

Si pars vacet, aut exuperet.

§ VII. Videamus, ſi pars aliqua vacet, nec tamen quiſquam ſine parte ſit hæres inſtitutus, quid juris ſit, veluti ſi tres ex quartis partibus hæredes ſcripti ſunt. Et conſtat, vacantem partem ſingulis tacite pro hæreditaria parte accedere, et perinde haberi, ac ſi ex tertiis partibus hæredes ſcripti eſſent: et ex diverſo, ſi plures hæredes ſcripti in portionibus ſint, tacite ſingulis decreſcere; ut, ſi (verbi gratia) quatuor ex tertiis partibus hæredes ſcripti ſint, perinde habeantur, ac ſi unuſquiſque ex quarta parte hæres ſcriptus fuiſſet.

§ 7. *Let us now inquire, what the law would direct, if a part of an inheritance ſhould remain unbequeathed, and yet a certain portion of it ſhould be given by teſtament to every nominated heir: as if three ſhould be inſtituted, and a fourth given to each. It is clear in this caſe, that the undiſpoſed part would veſt in each of them in proportion to the ſhare bequeathed to him, and that each would be reputed the written heir of a third. And, on the contrary, if many are nominated heirs in certain portions, ſo as to exceed the* As, *then each heir muſt ſuffer a defalcation* pro ratâ —— *for example, if four are inſtituted and a third is given to each, then this diſpoſition would work the ſame effect, as if each of the written heirs had been inſtituted to a fourth only.*

Si plures unciæ quam duodecim diſtributæ ſunt.

§ VIII. Et, ſi plures unciæ, quam duodecim, diſtributæ ſint, is, qui ſine parte inſtitutus eſt, quod dupondio deeſt, habebit. Idemque erit, ſi dupondius expletus ſit. Quæ omnes partes ad aſſem poſtea revocantur, quamvis ſint plurium unciarum.

§ 8. *If more parts or ounces, than twelve, are bequeathed, then he, who is inſtituted without any preſcribed ſhare, ſhall be intituled to what remains of a* dupondius, *that is, of twenty-four parts: and, if more, than twenty-four parts, are bequeathed, then the heir, who is nominated without any determinate ſhare, is intituled to the remainder of a* tripondius, i. e. *of thirty ſix parts or ounces. But all theſe parts are afterwards reduced to twelve.*

De modis inſtituendi.

§ IX. Hæres et pure et ſub conditione inſtitui poteſt: ex certo tempore, aut ad certum tempus, non poteſt: veluti, *poſt quinquennium, quam moriar*;

moriar; vel, *ex calendis illis*; vel, *uſque ad calendas illas hæres eſto.* Denique diem adjectum haberi pro ſupervacuo placet, et perinde eſſe, ac ſi pure hæres inſtitutus eſſet.

§ 9. *An heir may be conſtituted ſimply, or conditionally*—— *but not* from *or* to *any certain period: as if a teſtator ſhould ſay to* Titius, be thou my heir after five years *to be computed* from my death—— *or*— from the calends of ſuch a month ——*or*— 'till the calends of ſuch a month. *For time, thus added, is in law deemed ſuperfluous; and ſuch an inſtitution takes place immediately, as if it was a ſimple appointment.*

Ad certum tempus non poteſt.] Altho' by the civil law an heir can not be inſtituted either *from* a certain time or '*till* a certain time, *leſt the deceaſed ſhould ſeem to die partly teſtate and partly inteſtate*; yet, in *England*, an executor, who is *quaſi-hæres*, may be appointed either *from* or *until* a certain time: and the ordinary may commit the adminiſtration of the goods of the deceaſed to the next of kin in the mean time, during which time the act of the adminiſtrator is good; and can not afterwards be avoided by the executor. *Swin.* 310.

De conditione impoſſibili.

§ X. Impoſſibilis conditio in inſtitutionibus et legatis, nec non in fideicommiſſis et libertatibus, pro non ſcripta habetur.

§ 10. *An impoſſible condition in the inſtitution of heirs, the diſpoſition of legacies, the appointment of truſts, or the confering of liberty, is treated as unwritten or void.*

Impoſſibilis conditio.] "Altho' impoſſible "conditions, whether they are ſo by nature or "by law, do not hinder the effect of the diſpo- "ſition, being reputed as if they were not writ- "ten or uttered; yet, if a teſtator ſuppoſes a "condition to be poſſible, which is in reality "impoſſible or illegal, then ſuch condition is "not void, but will render the diſpoſition void, "to which it is added: as for inſtance; if the "teſtator makes *Titius* his executor, or gives "him an hundred pounds, if he marries his, "the teſtator's, daughter; ſuppoſing her to be "living, when ſhe is dead: in this caſe, the "condition is impoſſible; and yet *Titius* can "not become executor, or obtain the legacy; "becauſe it is not probable, that the teſtator "would have made him executor, or given "him an hundred pounds, if he had known, "or believed, his daughter to have been dead. *Swinb. part* 4. *ſect.* 6.

De pluribus conditionibus.

§ XI. Si plures conditiones in inſtitutionibus adſcriptæ ſunt, ſiquidem conjunctim, ut puta, *ſi illud et illud factum fuerit*, omnibus parendum eſt: ſi ſeparatim, veluti, *ſi illud aut illud factum erit*, cuilibet conditioni obtemperare ſatis eſt.

§ 11. *If many conditions are jointly required in the inſtitution of an heir*; *as thus*, if this thing *and* that thing be done, *then both muſt be complied with. But, if the conditions are placed ſeparately and in the disjunctive, as thus*, if this, *or* that be done, *it will then be ſufficient to obey either.*

De his, quos nunquam teſtator vidit.

§ XII. Ii, quos nunquam teſtator vidit, hæredes inſtitui poſſunt, veluti ſi fratris filios peregrinantes, ignorans qui eſſent, hæredes inſtituerit. Ignorantia enim teſtantis inutilem inſtitutionem non facit.

§ 12.

§ 12. *A teſtator may appoint perſons, whom he hath never ſeen, to be his heirs. He may, for example, inſtitute his brother's ſons, who are in a foreign country, altho' he does not know where they are; for the want of this knowledge in a teſtator will not vitiate the inſtitution of an heir.*

TITULUS DECIMUS-QUINTUS.

De vulgari ſubſtitutione.

D. xxviii. T. 6. C. vi. T. 25 et 26.

De pluribus gradibus hæredum.

POTEST autem quis in teſtamento ſuo plures gradus hæredum facere; ut puta, *ſi ille hæres non erit, ille hæres eſto.* Et deinceps, in quantum velit, teſtator ſubſtituere poteſt: ut noviſſimo loco in ſubſidium vel ſervum neceſſarium hæredem inſtituere poſſit.

A man by teſtament may appoint many degrees of heirs; as thus — if *Titius* will not be my heir, let *Seius* be my heir. *And he may proceed in ſuch a ſubſtitution as far as he ſhall think proper; and laſtly, in default of all others, he may conſtitute a ſlave to be his neceſſary heir.*

De numero hæredum in ſingulis gradibus.

§ I. Et plures in unius locum poſſunt ſubſtitui, vel unus in plurium, vel ſinguli in ſingulorum, vel invicem ipſi, qui hæredes inſtituti ſunt.

§ 1. *A teſtator may ſubſtitute many in the place of one, or one in the place of many, or one in the place of each, or he may ſubſtitute even his inſtituted heirs reciprocally to one another.*

Plures in unius locum.] This kind of ſubſtitution, which is called ordinary or vulgar, is of no ſmall uſe in *England*, and we do therein, for the moſt part, follow the precepts and rules of the civil law: for it is nothing elſe but the adding a condition, which we commonly call *tail* in the caſe of lands; namely, a limitation of heirs, to whom a teſtator intends, that his lands ſhould deſcend. *Strahan* on *Domat*. vol. 2. p. 221. *Cowel*'s inſt. tit. 15.

Quam partem ſinguli ſubſtituti accipiant, ſi partes in ſubſtitutione expreſſæ non ſint.

§ II. Et, ſi ex diſparibus partibus hæredes ſcriptos invicem ſubſtituerit, et nullam mentionem partium in ſubſtitutione habuerit, eas videtur in ſubſtitutione partes dediſſe, quas in inſtitutione expreſſit: et ita Divus Pius reſcripſit.

§ 2. *If a teſtator, having inſtituted ſeveral co-heirs in unequal portions, ſubſtitutes them reciprocally the one to the other, and makes no mention of their ſhares of the inheritance in the ſubſtitution, he ſeems to have given the ſame ſhares by the ſubſtitution, which he gave by the inſtitution; and this is agreeable to the reſcript of the emperor* Antoninus.

Et ſi ex diſparibus.] For example, if a teſtator ſhould bequeath to *Primus* one twelfth of his eſtate —— to *Secundus* eight twelfths, and to *Tertius* three twelfths; adding, that he ſubſtitutes them all, the one to another reciprocally — then if *Primus*, for inſtance, ſhould at the death of the teſtator refuſe to take his twelfth, it muſt be ſubdivided into eleven equal parts, of which eight muſt be given to *Secundus*, and three to *Tertius*. Ferriere, *h. l.*

Ita Divus Pius.] *vid. Cod.* 6. *t.* 26. *l.* 1. *ff* 28. *t.* 6. l. 24.

Si cohæredi ſubſtituto alius ſubſtituatur.

§ III. Sed, ſi inſtituto hæredi, cohærede ſubſtituto dato, alius ei ſubſtitutus fuerit, Divi Severus et Antoninus ſine diſtinctione reſcripſerunt, ad utramque partem ſubſtitutum admitti.

§ 3. *If a co-heir is ſubſtituted to an inſtituted heir, and a third perſon is ſubſtituted to that co-heir, the emperors,* Severus *and* Antoninus, *have by reſcript ordained, that ſuch ſubſtituted perſon ſhall be admited to the portions of both the co-heirs without diſtinction.*

Cohærede ſubſtituto dato.] *Syphax* gave ſix 12ths of his eſtate to *Titius*, and ſix to *Caius*, making them co-heirs; he then ſubſtituted *Titius* to *Caius* and *Sempronius* to *Titius*: but, *Titius* and *Caius* dying, or declining the inheritance, it became a queſtion, to what ſhare *Sempronius* ſhould be admited; and it was determined, that the emperor or treaſury ſhould take no ſhare of the deceaſed's effects in this caſe, but that *Sempronius* the ſubſtitute ſhould be admitted without diſtinction as well to the ſhare of *Caius* as to that of *Titius*. *Mynſinger, h. l. ff* 28. *t.* 6. *l.* 27.

Si quis ſervo, qui liber exiſtimabatur, inſtituto ſubſtitutus fuerit.

§ IV. Si ſervum alienum quis patremfamilias arbitratus hæredem ſcripſerit, et, ſi hæres non eſſet, Mævium ei ſubſtituerit; iſque ſervus juſſu domini adierit hæreditatem, Mævius ſubſtitutus in partem admittitur. Illa enim verba, *ſi hæres non erit*, in eo quidem, quem alieno juri ſubjectum eſſe teſtator ſcit, ſic accipiuntur, *ſi neque ipſe hæres erit, neque alium hæredem effecerit:* in eo vero, quem patremfamilias arbitratur, illud ſignificant, *ſi hæreditatem ſibi, vel ei, cujus juri poſtea ſubjectus eſſe cæperit, non acquiſierit.* Idque Tiberius Cæſar in perſona Parthenii ſervi ſui conſtituit.

§ 4. *If a teſtator conſtitutes the ſlave of another to be his heir, ſuppoſing him to be free, and adds* —— if he does not become my heir, I ſubſtitute *Mævius* in his place —— *then, if that* ſlave *ſhould afterwards enter upon the inheritance at the command of his maſter,* Mævius, *the ſubſtitute, would be admited to a moity. For the words,* if he does not become my heir, *in regard to him, whom the teſtator knew to be under the dominion of another, are taken to mean,* if he will neither become my heir himſelf, nor cauſe another to be my heir: *but in regard to him, whom the teſtator ſuppoſed to be free, they imply this condition; viz.* if my heir will neither acquire the inheritance for himſelf, nor for him, to whoſe dominion he may afterwards become ſubject. *But it was determined by* Tiberius, *the emperor, in the caſe of his own ſlave* Parthenius, *that a ſubſtitute in ſuch a caſe ſhould be admited to a moity.*

Illa enim verba.] *Servum tuum, ſui juris eſſe credens, inſtitui hæredem, et ſic adjeci*: SI AUTEM HÆRES MIHI NON FIAT, MÆVIUS HÆRES ESTO. *Poſt mortem meam tu juſſiſti ſervum tuum, quem inſtitueram, adire hæreditatem. Quærimus, an locus ſit ſubſtitutioni? Et dicimus, ſubſtitutum accipere*

accipere ſemiſſem. Sed dicere quis poſſit, ſubſtitutum accipere totum; dixit enim teſtator; ILLE MIHI HÆRES ESTO, SI AUTEM NON FIAT, MÆVIUS ESTO: *igitur hic, quoniam inſtitutus, qui ſervus eſt, hæres eſſe non poterat, ſubſtitutum oportet in totum aſſem vocari. Sed ad hoc dicendum eſt, verba illa,* SI HÆRES NON ERIT, *ſiquidem inſtitutus eſt alieni juris, atque hoc teſtator novit, ſic intelligere debemus, hoc eſt, ſi neque ipſe inſtitutus hæres fiat, neque alium hæredem faciat, hoc eſt, alii haud acquiſierit, ut ſic ſubſtitutio locum inveniat. Aſt in illo inſtituto, quem ſui eſſe juris teſtator credidit, dictio,* SI HÆRES NON ERIT, *hoc ſignificat, ſi hæreditatem ſibi, aut ei, cujus in poteſtate poſtea eſſe incipiet, non acquiſierit, ut ſubſtitutio locum capiat in univerſum. Hic autem, quoniam alieni juris jam erat, qui credebatur ſui eſſe juris, idcirco ſubſtitutus ſemiſſem accipit. Atque hoc Divus Pius reſcripſit in Parthenio ſervo ſuo: Parthenium enim imperatoris ſervum aliquis credens liberum eſſe, hæredem inſtituit, ſic ſubſtituens ac dicens:* SIN AUTEM PARTHENIUS MIHI HÆRES NON FIAT, MÆVIUS HÆRES ESTO. *Et facta tunc eſt conſtitutio, ut ſemis hæreditatis per Parthenium Cæſari acquireretur, in alterum vero ſemiſſem Mævius ſubſtitutus vocaretur.* Theoph.

TITULUS DECIMUS-SEXTUS.

De pupillari ſubſtitutione.

D. xxviii. T. 6. C. vi. T. 26.

Forma, effectus, origo, et ratio pupillaris ſubſtitutionis.

LIBERIS ſuis impuberibus, quos in poteſtate quis habet, non ſolum ita, ut ſupra diximus, ſubſtituere poteſt, id eſt, ut, ſi hæredes ei non extiterint, alius ſit ei hæres: ſed eo amplius, ut, ſi hæredes ei extiterint, et adhuc impuberes mortui fuerint, ſit eis aliquis hæres: veluti ſi quis dicat hoc modo: *Titius filius hæres mihi eſto; et, ſi filius mihi hæres non erit, ſive hæres erit, et prius moriatur, quam in ſuam tutelam venerit*, id eſt, antequam pubes factus ſit, *tunc Seius hæres eſto.* Quo caſu, ſiquidem non extiterit hæres filius, tunc ſubſtitutus patri ſit hæres: ſi vero extiterit hæres filius, et ante pubertatem deceſſerit, ipſi filio ſit hæres ſubſtitutus. Nam moribus inſtitutum eſt, ut, cum ejus ætatis filii ſint, in qua ipſi ſibi teſtamentum facere non poſſunt, parentes eis faciant.

A parent can ſubſtitute to his children, who are within puberty, and under his power, not only in the manner before-mentioned, which is thus --- if my children will not be my heirs, let ſome other perſon be my heir --- *but he may write* --- if my children actually become my heirs, but die within puberty, let another become their heir: *for example*; let *Titius*, my ſon, be my heir; and, if he either does not, or does, become my heir, and dies before he ceaſes to be under tutelage, [i. e. *before he arrives at the age of puberty*,] let *Seius* be my heir. *And, in this caſe, if the ſon does not enter upon the inheritance, the ſubſtitute becomes heir to the father; and, if the ſon takes the inheritance, and dies a pupil before the*

age of puberty, the ſubſtitute is then heir to the ſon. For cuſtom has ordained, that parents may make wills for their children, when their children are not of age to make wills for themſelves.

De ſubſtitutione mente capti.

§ I. Qua ratione excitati, etiam conſtitutionem poſuimus in noſtro codice, qua proſpectum eſt, ut, ſi qui mente captos habeant filios, vel nepotes, vel pronepotes, cujuſcunque ſexus vel gradus, liceat eis, etſi puberes ſint, ad exemplum pupillaris ſubſtitutionis, certas perſonas ſubſtituere: ſin autem reſipuerint, eandem ſubſtitutionem infirmari ſancimus: et hoc ad exemplum pupillaris ſubſtitutionis, quæ, poſtquam pupillus adoleverit, infirmatur.

§ 1. *Excited by humanity, and the reaſonableneſs of the foregoing uſage, we have inſerted a conſtitution into our code, by which it is provided, that, if a man has children, grand-children, or great-grand-children, who are mad or diſordered in their ſenſes, he may make a ſubſtitution of certain perſons to ſuch children, in the manner of a pupillary ſubſtitution, altho' they are arrived at the age of full puberty. But we have decreed, that this ſpecies of ſubſtitution ſhall be void, as ſoon as they ſhall have recovered from their diſorder; and this we have done in imitation of pupillary ſubſtitution, which ceaſes to be in force, when the minor attains to puberty.*

Infirmari ſancimus] *vid. Cod.* 6. *t.* 26. *l.* 9. *ff.* 28. *t.* 6. *l* 93.

Proprium pupillaris ſubſtitutionis.

§ II. Igitur in pupillari ſubſtitutione ſecundum præfatum modum ordinata duo quodammodo ſunt teſtamenta, alterum patris, alterum filii; tanquam ſi ipſe filius ſibi hæredem inſtituiſſet: aut certe unum teſtamentum eſt duarum cauſarum, id eſt, duarum hæreditatum.

§ 2. *In a pupillary ſubſtitution, made after the form before-mentioned, there are in a manner two teſtaments, the one of the father, the other of the ſon; as if the ſon had inſtituted an heir for himſelf: at leaſt there is, in ſuch a ſubſtitution, one teſtament containing a diſpoſition of two inheritances.*

Alia forma ſubſtituendi pupillariter.

§ III. Sin autem quis ita formidoloſus ſit, ut timeat, ne filius ſuus pupillus adhuc ex eo, quod palam ſubſtitutum acceperit, poſt obitum ejus periculo inſidiarum ſubjaceat, vulgarem quidem ſubſtitutionem palam facere, et in primis teſtamenti partibus ordinare, debet: illam autem ſubſtitutionem, per quam, ſi hæres extiterit pupillus et intra pubertatem deceſſerit, ſubſtitutus vocatur, ſeparatim in inferioribus partibus ſcribere debet, eamque partem proprio lino propriaque cera conſignare: et in priore parte teſtamenti cavere, ne inferiores tabulæ, vivo filio et adhuc impubere, aperiantur. Illud palam eſt, non ideo minus valere ſubſtitutionem impuberis filii, quod in iiſdem tabulis

ſcripta

ſcripta ſit, quibus ſibi quiſque hæredem inſtituiſſet; quamvis pupillo hoc periculoſum ſit.

§ 3. *If a teſtator is apprehenſive, leſt, at the time of his death, his ſon. being as yet a pupil, ſhould be liable to fraud and impoſition, if a ſubſtitute ſhould be publicly given to him, he ought to inſert a vulgar ſubſtitution in the firſt tablet of his teſtament; and to write that ſubſtitution, in which a ſubſtitute is named,* if his ſon ſhould die within puberty, *in the lower tablet, which ought to be ſeparately tied up and ſealed: and it alſo behoves the teſtator to inſert a clauſe in the firſt part of his teſtament, forbiding the lower part to be opened, whileſt his ſon is alive, and within the age of puberty. But, altho' it is certain, that a ſubſtitution to a ſon within puberty is not leſs valid, becauſe it is writen on the ſame tablet, in which the teſtator hath appointed him to be his heir, it is however unſafe and dangerous.*

Quibus ſubſtituitur.

§ IV. Non ſolum tamen hæredibus inſtitutis impuberibus liberis ita ſubſtituere parentes poſſunt, ut, ſi hæredes eis extiterint, et ante pubertatem mortui fuerint, ſit eis hæres is, quem ipſi voluerint; ſed etiam exhæredatis. Itaque eo caſu, ſi quid exhæredato pupillo ex hæreditatibus, legatiſve, aut donationibus, propinquorum atque amicorum acquiſitum fuerit, id omne ad ſubſtitutum pertinebit. Quæcunque diximus de ſubſtitutione impuberum liberorum, vel hæredum inſtitutorum, vel exhæredatorum, eadem etiam de poſthumis intelligimus.

Parents are not only allowed to give a ſubſtitute to their children within puberty, if ſuch children become their heirs, and die within puberty; but parents are alſo permited to give a ſubſtitute to their diſinherited children; and therefore, whatever a diſinherited child, within the age of puberty, may have acquired by inheritances, by legacies, or by the gift of relations and friends, the whole will become the property of the ſubſtitute. All, which we have hitherto ſaid concerning the ſubſtitution of pupils, whether they are inſtituted heirs, or diſinherited children, is underſtood to extend alſo to poſthumous children.

Pupillare teſtamentum ſequela paterni.

§ V. Liberis autem ſuis teſtamentum nemo facere poteſt, niſi et ſibi faciat; nam pupillare teſtamentum pars et ſequela eſt paterni teſtamenti: adeo ut, ſi patris teſtamentum non valeat, nec filii quidem valebit.

§ 5. *No parent can make a teſtament for his children, unleſs he hath made a teſtament for himſelf: for the teſtament of a child within puberty is a part and conſequence of the teſtament of the parent, inſomuch that, if the teſtament of the father is not valid, the teſtament of the ſon will not take effect.*

Quot liberis ſubſtituitur.

§ VI. Vel ſingulis autem liberis, vel ei, qui eorum noviſſimus impubes morietur, ſubſtitui poteſt. Singulis quidem, ſi neminem eorum

inteſtatum decedere voluerit: noviſſimo, ſi jus legitimarum hæreditatum integrum inter eos cuſtodiri velit.

§ 6. *A parent may make a pupillary ſubſtitution to each of his children, or to him, who ſhall die the laſt within puberty. He may ſubſtitute to each of his children, if he is unwilling, that any of them ſhould die inteſtate; and he may ſubſtitute to the laſt, who ſhall die within puberty, if he is willing, that they ſhould preſerve among themſelves the intire right of ſucceſſion.*

De ſubſtitutione nominatim aut generaliter facta.

VII. Subſtituitur autem impuberi aut nominatim, veluti, Titius *hæres eſto:* aut generaliter, ut, *Quiſquis mihi hæres erit.* Quibus verbis vocantur ex ſubſtitutione, impubere mortuo filio, illi, qui et ſcripti ſunt hæredes, et extiterunt, et pro qua parte hæredes facti ſunt.

§ 7. *A ſubſtitution may be made to a child within puberty, either nominally; as for example* --- If my ſon becomes my heir, and dies a pupil, let TITIUS be my heir; --- *or generally thus* --- Whoever ſhall be my heir, let the ſame perſon be a ſubſtitute to my ſon, if he dies within puberty. *And, by theſe general words, all, who have been inſtituted, and have taken upon them the inheritance of the father, muſt be called, by virtue of the ſubſtitution, to the inheritance of the ſon, if he dies within puberty; each being intituled to a part of the ſon's inheritance, in proportion to the ſhare, which he had in the father's.*

Quiſquis mihi hæres erit.] This general form muſt be underſtood to be of uſe, either when a parent hath appointed many to be his heirs with his ſon, or hath diſinherited his ſon, and inſtituted others. But, for the better explanation of this ſection, it will be proper to ſet down the words of *Theophilus*, whoſe paraphraſe of the text is a work of great authority, and will always be of infinite uſe in explaining the inſtitutes. "*Præ-*
" *terea nominatim impuberi ſubſtituere poſſum, et di-*
" *cere: ſi filius meus hæres mihi fuerit, et impubes de-*
" *eſſerit,* Titius *ei hæres eſto. Poſſum et generaliter*
" *ei ſubſtituere; verbi gratia; multos una cum filio*
" *meo hæredes inſtitui, aut multis inſtitutis hæredibus*
" *filium exhæredavi. Poſſum generaliter ita ſub-*
" *ſtituere dicens; quiſquis mihi patri hæres erit,*
" *is et filio meo ante pubertatem morienti ſubſtitutus*
" *eſto. Per quæ verba, ex ſubſtitutione ad heredi-*
" *tatem impuberis venient, qui et ſcripti ſunt hæredes*
" *et exſtiterunt. Nam, ſi inſtituti hæreditatem ex*
" *principali parte repudiaverint, ex pupillari ſub-*
" *ſtitutione nil capient; dividitur autem inter eos*
" *pupilli hæreditas pro portione hæreditaria,* i. e. *pro*
" *qua parte patri hæredes facti ſunt.*" Theoph. *h. t.*

Quomodo ſubſtitutio pupillaris finitur.

§ VIII. Maſculo igitur uſque ad quatuordecim annos ſubſtitui poteſt: fœminæ uſque ad duodecim annos. Et, ſi hoc tempus exceſſerint, ſubſtitutio evaneſcit.

§ 8. *A pupillary ſubſtitution may be made to males, till they arrive at fourteen complete; and to females, till they have completed their twelfth year: and, when they exceed either of theſe ages, the ſubſtitution becomes extinct.*

Quibus pupillariter non ſubſtituitur.

§ IX. Extraneo vero vel filio puberi hæredi inſtituto ita ſubſtituere nemo poteſt, ut, ſi hæres extiterit, et intra aliquod tempus deceſſerit, alius ei ſit hæres: ſed hoc ſolum permiſſum eſt, ut eum per fideicommiſſum

missum testator obliget alii hæreditatem ejus vel totam vel pro parte restituere: quod jus quale sit, suo loco trademus.

§ 9. *A pupillary substitution cannot be made with effect, either to a stranger, who is instituted, or even to a son, who is instituted, if his age excedes that of puberty. But a testator may oblige his heir to give to another either a part, or even the whole of the inheritance, by virtue of a* fidei-commissum, *or gift in trust; which we will treat of in it's proper place.*

TITULUS DECIMUS-SEPTIMUS.

Quibus modis testamenta infirmantur.

D. xxviii. T. 3.

Quibus modis testamenta infirmentur.

TEstamentum jure factum usque eo valet, donec rumpatur, irritumve fiat.

A Testament, legally made, remains valid, until it is either broken, or rendered ineffectual.

Quando testamentum dicatur rumpi. Primum de adoptione.

§ 1. Rumpitur autem testamentum, cum, in eodem statu manente testatore, ipsius testamenti jus vitiatur. Si quis enim post factum testamentum adoptaverit sibi filium per imperatorem eum, qui est sui juris, aut per prætorem, secundum nostram constitutionem, eum, qui in potestate parentis fuerit, testamentum ejus rumpitur quasi agnatione sui hæredis.

§ 1. *A testament is said to be broken, or revoked, when the force of it is destroyed, whilest the testator still remains in the same state. For, if a testator, after making his testament, should arrogate an independent person, by licence from the emperor, or in the presence of the prætor, should adopt a child under the power of his natural parent, by virtue of our constitution, then that testament would be broken by this* quasi-*birth of a proper heir.*

Secundum nostram constitutionem] *vid. Cod. t.* 48. *l.* 10.

De

De poſteriori teſtamento.

§ II. Poſteriore quoque teſtamento, quod jure perfectum eſt, ſuperius rumpitur: nec intereſt, extiterit aliquis hæres ex eo, an non. Hoc enim ſolum ſpectatur, an aliquo caſu exiſtere potuerit. Ideoque, ſi quis aut noluerit hæres eſſe, aut vivo teſtatore, aut poſt mortem ejus, antequam hæreditatem adiret, deceſſerit, aut conditione, ſub qua hæres inſtitutus eſt, defectus ſit, in his caſibus pater-familias inteſtatus moritur. Nam et prius teſtamentum non valet, ruptum à poſteriore; et poſterius æque nullas vires habet, cum ex eo nemo hæres extiterit.

§ 2. *A former teſtament, altho' legally perfect, may be broken or revoked by a ſubſequent teſtament; nor is it material, whether the heir, nominated in the later teſtament, can or will take the heirſhip at the death of the teſtator; for the only thing regarded is, whether he might have been the heir: and therefore, if an inſtituted heir ſhould refuſe to take the heirſhip, or ſhould die, living the teſtator, or after his death, and before he could enter upon the inheritance; or if he ſhould die, before the the condition is accompliſhed, upon which he was inſtituted, then, in any of theſe caſes, the teſtator would die inteſtate; for the firſt teſtament would be invalid, being broken or revoked by the ſecond, and the ſecond would be of as little force, for want of an heir.*

De poſteriore, in quo hæres certæ rei inſtitutus.

§ III. Sed, ſi quis, priore teſtamento jure perfecto, poſterius æque jure fecerit, etiamſi ex certis rebus in eo hæredem inſtituerit, ſuperius tamen teſtamentum ſublatum eſſe, Divi Severus et Antoninus Auguſti reſcripſerunt: cujus conſtitutionis verba et hic inſeri juſſimus, cum aliud quoque præterea in ea conſtitutione expreſſum ſit. *Imperatores Severus et Antoninus Auguſti Cocceio Campano. Teſtamentum ſecundo loco factum, licet in eo certarum rerum hæres ſcriptus ſit, perinde jure valere, ac ſi rerum mentio facta non eſſet: ſed et teneri hæredem ſcriptum, ut contentus rebus ſibi datis, aut ſuppleta quarta ex lege Falcidia, hæreditatem reſtituat his, qui in priore teſtamento ſcripti fuerant, propter inſerta fidei-commiſſi verba, quibus ut valeret prius teſtamentum expreſſum eſt, dubitari non oportet.* Et ruptum quidem teſtamentum hoc modo efficitur.

§ 3. *If a man, who has already made a teſtament legally perfect, ſhould make a ſubſequent teſtament equally good, and inſtitute an heir in it to ſome particular things only, the emperors* Severus *and* Antoninus *have by reſcript declared, that, in this caſe, the firſt will ſhall be broken or revoked, as a teſtament. But we have commanded the words of this conſtitution to be here inſerted." The emperors* Severus *and* Antoninus *to* Cocceius Campanus. We determine, that a ſecond teſtament, altho' the heir named in it is not univerſal, but inſtituted to particular things only, ſhall be as good in law, as if no mention had been made of particular things; yet it is not to be doubted, but that the writen heir ſhall be obliged to content himſelf either with the things given him, or with the fourth part, allowed by the *Falcidian* law, and ſhall be bound to reſtore the reſt of the inheritance

to

to the heirs inſtituted in the firſt teſtament, on account of the words, denoting a truſt, inſerted in the ſecond teſtament, by which words it is expreſsly declared, that the firſt teſtament ſhall ſubſiſt. --- *And, in this manner, a teſtament may be ſaid to be broken or cancelled.*

In ea conſtitutione.] *vid. ff.* 36. *t.* 1. *l*, 29.
Ex lege Falcidia.] *vid. titulum* 22. *hujus libri.*

De teſtamento irrito; et quibus modis fit irritum.

§ IV. Alio autem modo teſtamenta jure facta infirmantur; veluti cum is, qui fecit teſtamentum, capite diminutus ſit: quod, quibus modis accidat, primo libro retulimus.

§ 4. *Teſtaments, legally made, are alſo invalidated, if the teſtator ſuffers diminution, that is, changes his condition: and, in the firſt book of our inſtitutes, we have ſhewed by what means diminution, or a change of ſtate, may happen.*

Cur dicatur irritum.

§ V. Hoc autem caſu irrita fieri teſtamenta dicuntur; cum alioqui, et quæ rumpuntur, irrita fiant, et ea, quæ ſtatim ab initio non jure fiunt, irrita ſint. Sed et ea, quæ jure facta ſunt, et poſtea per capitis diminutionem irrita fiunt, poſſumus nihilominus rupta dicere. Sed, quia ſane commodius erat, ſingulas cauſas ſingulis appellationibus diſtingui, ideo quædam non jure facta dicuntur, quædam jure facta rumpi vel irrita fieri.

§ 5. *In the caſe of diminution, teſtaments are ſaid to become* irrita, *i. e. ineffectual; altho' thoſe, which are broken or revoked, and thoſe, which from the begining were not legal, do all equally become ineffectual* [*or* irrita] *in reality. We may alſo term thoſe teſtaments broken, which are at firſt legally made, but are afterwards rendered ineffectual, by diminution, or change of ſtate. But, as it is proper, that every particular defect ſhould be diſtinguiſhed by a particular appellation, thoſe teſtaments, which are illegal, are termed* null; --- *thoſe, which were at firſt legal, but afterwards loſe their force, by ſome revocatory act of the teſtator, are ſaid to be* rupta, *or broken; and thoſe, ſince the making of which, the teſtator hath ſuffered a change of ſtate, are ſaid to be* irrita, *or ineffectual.*

Quibus modis convaleſcit.

§ VI. Non tamen per omnia inutilia ſunt ea teſtamenta, quæ, ab initio jure facta, per capitis diminutionem irrita facta ſunt: nam, ſi ſeptem teſtium ſignis ſignata ſunt, poteſt ſcriptus hæres, ſecundum tabulas teſtamenti, bonorum poſſeſſionem agnoſcere; ſi modo defunctus et civis Romanus, et ſuæ poteſtatis, mortis tempore fuerit. Nam, ſi ideo irritum factum ſit teſtamentum, quia civitatem vel etiam libertatem teſtator amiſit, aut quia in adoptionem ſe dedit, et mortis tempore in adoptivi patris poteſtate ſit, non poteſt ſcriptus hæres ſecundum tabulas bonorum poſſeſſionem petere.

§ 6. *But*

§ 6. *But a teſtament, which was at firſt legally made, and hath afterwards been rendered void by diminution, is not always without effect; for the writen heir is intituled to the poſſeſſion of the goods, by virtue of the teſtament, if it appears, that it was ſealed by ſeven witneſſes, and that the teſtator was a* Roman *citizen, and not under power, at the time of his death: but, if a teſtament became void, becauſe the teſtator had loſt the right of a citizen, or his liberty, or had given himſelf in adoption, and at the time of his death, ſtill continued under the power of his adoptive father, then the writen heir could not demand the poſſeſſion of the goods, in conſequence of the teſtament.*

De nuda voluntate.

§ VII. Ex eo autem ſolo non poteſt infirmari teſtamentum, quod poſtea teſtator id noluerit valere: uſque adeo ut, ſi quis, poſt factum prius teſtamentum, poſterius facere cœperit, et, aut mortalitate præventus, aut quia eum ejus rei pœnituit, id non perfecerit, Divi Pertinacis oratione cautum ſit, ne alias tabulæ priores, jure factæ, irritæ fiant, niſi ſequentes jure ordinatæ et perfectæ fuerint: nam imperfectum teſtamentum ſine dubio nullum eſt.

§ 7. *A teſtament cannot be invalidated ſolely, becauſe the teſtator was afterwards unwilling, that it ſhould ſubſiſt; ſo that, if a man, after making one teſtament, ſhould begin another, and by reaſon of death, or change of mind, ſhould not proceed to perfect that teſtament, it is provided by the oration or ordinance of the emperor* Pertinax, *that the firſt teſtament ſhall not be revoked, unleſs the ſecond is both legal and perfect; for an imperfect teſtament is undoubtedly null.*

Pertinacis oratione.] The emperors were accuſtomed to ſpeak orations in the ſenate, or ſend them to the ſenate in writing; and the decrees were afterwards drawn up according to the tenor of thoſe ſpeeches or orations. *ff.* 23. *t.* 2. *l.* 16. *Vinn.*

Si princeps litis cauſa, vel ob teſtamentum imperfectum, inſtitutus fuerit.

§ VIII. Eadem oratione expreſſit, non admiſſurum ſe hæreditatem ejus qui litis cauſa principem reliquerit hæredem: neque tabulas non legitime factas, in quibus ipſe ob eam cauſam hæres inſtitutus erat, probaturum: neque ex nuda voce hæredis nomen admiſſurum: neque ex ulla ſcriptura, cui juris auctoritas deſit, aliquid adepturum. Secundum hoc Divi Severus et Antoninus ſæpiſſime reſcripſerunt. *Licet enim,* inquiunt, *legibus ſoluti ſimus, attamen legibus vivimus.*

§ 8. *The emperor* Pertinax *hath declared by the ſame ordinance, that he would not take the inheritance of any teſtator, who left him his heir, becauſe a law-ſuit was depending: --- that he would never eſtabliſh a will, deficient in point of form, if he was upon that account inſtituted the heir --- that he would by no means ſuffer himſelf to be nominated an heir by the mere word of mouth of a teſtator; and that he would never take any emolument by virtue of any writing whatever, not authoriſed by the ſtrict rules of law. The emperors* Severus *and* Antoninus *have*

have alſo often iſſued reſcripts to the ſame purpoſe: "for altho', [ſay they,] we are "certainly not ſubject to the laws, yet we live in obedience to them.

Legibus vivimus.] "Claudianus poeta, in "panegyr. v. 307. de quarto conſulatu Hono-"rii, his verſibus principem hujus officii ſic "commonefacit.

"In commune jubes ſi quid, cenſeſve tenendum,
"Primus juſſa ſubi: tunc obſervantior æqui
"Fit populus, nec ferre negat, cum viderit ipſum
"Auctorem parere ſibi. Componitur orbis
"Regis ad exemplum; nec ſic inflectere ſenſus
"Humanos edicta valent, ut vita Regentis."
Vinn.

TITULUS DECIMUS-OCTAVUS.

De inofficioſo teſtamento.

D. v. T 2. C. iii. T. 28.

Ratio hujus querelæ.

QUIA plerumque parentes ſine cauſa liberos ſuos exhæredant vel omittunt, inductum eſt, ut de inofficioſo teſtamento agere poſſint liberi, qui queruntur, aut inique ſe exhæredatos, aut inique præteritos: hoc colore, quaſi non ſanæ mentis fuerint, cum teſtamentum ordinarent. Sed hoc dicitur, non quaſi vere furioſus ſit, ſed recte quidem teſtamentum fecerit, non autem ex officio pietatis. Nam, ſi vere furioſus ſit, nullum teſtamentum eſt.

Inaſmach as parents often diſinherit their children without cauſe or omit to mention them in their teſtaments, it has therefore been introduced, as law, that children, who have been unjuſtly diſinherited or unjuſtly omited in the teſtaments of their parents, may complain, that ſuch teſtaments are inofficious, under color, that their parents were not of ſane mind, when they made them: but, in theſe caſes, it is not averred to be ſtrictly true, that the teſtator was really mad or diſordered in his ſenſes, but it is urged as a mere fiction only; for the teſtament is acknowledged to have been well made, and the only exception to it is, that the teſtament is not conſiſtent with the duty of a parent. For, if a teſtator was really not in his ſenſes at the time of making his teſtament, it is certainly null.

Quia plerumque parentes.] The plaint, or action, in the caſe of an undutiful teſtament, which civilians call *teſtamentum inofficioſum*, is not in uſe in *England*; where, by the common law, all perſons, intituled to make a will, have ever had a free power of bequeathing their goods and chattels, in whatever manner they thought beſt; and it was only by the particular cuſtom of ſome places, that this power was reſtrained: ſo that the writ called *breve de rationabili parte bonorum*, which the wife or children of the deceaſed had againſt the executors for the recovery of part of the goods, was not general throughout the kingdom, but peculiar to certain countries, where the cuſtom was, that, debts being paid, the remainder ſhould be divided into three equal parts; *viz.* one to the wife, another to the children, and a third to attend the will of the teſtator. *Cowel lib. 2. t. 18.*

The cuſtom of reſerving a reaſonable part of the goods for the widows and children of teſtators is ſtill in force in the city of *London*, as to the widows and children of freemen; but in other parts of the kingdom, where this cuſtom did formerly prevail, it has been aboliſhed by act of parliament; ſee 4 and 5 *Will.* and *Mary*, *cap* 6. The inhabitants of the province of *York* are alſo impowered to diſpoſe of their perſonal eſtates by their wills, notwithſtanding the cuſtom of that province, as to the reaſonable part claimed

by widows and children; but the act excepts the cities of *York* and *Cheſter*; yet the ſame liberty was afterwards extended to the freemen of the city of *York*, by the ſtatute of the 2d and 3d of Queen *Anne*. And by the 7th and 8th of *William* the 3d, *cap.* 38. the ſame cuſtom was aboliſhed in the principality of *Wales*. See Dr. *Strahan*'s notes on *Domat*, vol. 2. p. 109.— But, by the law of *Scotland*, a teſtator cannot by teſtament deprive his wife or children of their legitime or reaſonable part. *Stair's inſt. lib.* 3. *t.* 8. *Mackenzie's inſt. lib.* 3. *t.* 9. *p.* 251.

Hoc colore] This pretext was made uſe of to avoid the appearance of impugning the teſtament of a man in his ſenſes, contrary to the authority of the 12 tables, which give all perſons, capable of making a will, a free and uncontrouled power of bequeathing their effects juſt as they think proper. "*Verbis legis* 12 *tabularum* "*his*, uti legaſſit ſuæ rei, ita jus eſto, *latiſſima* "*poteſtas tributa videtur, et hæredis inſtituendi, et* "*legata et libertates dandi, tutelas quoque con-*"*ſtituendi; ſed id interpretatione coangustatum eſt.* "*&c. ff.* 50. *t.* 16. *l.* 120. de verb. ſign."

Qui de inofficioſo agunt.

§ I. Non autem liberis tantum permiſſum eſt teſtamentum parentum inofficioſum accuſare, verum etiam liberorum parentibus: ſoror autem et frater turpibus perſonis ſcriptis hæredibus ex ſacris conſtitutionibus prælati ſunt. Non ergo contra omnes hæredes agere poſſunt. Ultra fratres igitur et ſorores cognati nullo modo aut agere poſſunt, aut agentes vincere.

§ 1. *Children are not the only perſons allowed to complain, that teſtaments are inofficious; for parents are in like manner permited to make the ſame complaint. Alſo the brothers and ſiſters of a teſtator are, by virtue of the imperial conſtitutions, prefered to infamous perſons, if any ſuch have been inſtituted by the deceaſed to be his heirs; but brothers and ſiſters are not therefore allowed to make a complaint againſt* any *heir, whom the teſtator ſhall have inſtituted. And collaterals, beyond brothers and ſiſters, can by no means complain of the undutifulneſs of a teſtament, if their right to complain is oppoſed; but if their right of complaining is not diſputed and the teſtament is annulled, yet thoſe only can be benefited, who are the neareſt in ſucceſſion upon the inteſtacy.*

Conſtitutionibus.] *vid. Cod.* 3. *t.* 28. *ll.* 21. 27.

Aut agentes vincere.] *Si quis, ex iis perſonis quæ ad ſucceſſionem ab inteſtato non admittuntur, de inofficioſo egerit,* [*nemo enim eum repellit,*] *et caſu obtinuerit, non ei proſit victoria, ſed his, qui habent ab inteſtato ſucceſſionem. ff.* 5. *t.* 2. *l.* 6.

Qui alio jure veniunt, de inofficioſo non agunt.

§ II. Tam autem naturales liberi, quam ſecundum noſtræ conſtitutionis diviſionem adoptati, ita demum de inofficioſo teſtamento agere poſſunt, ſi nullo alio jure ad defuncti bona venire poſſint: nam, qui ad hæreditatem totam vel partem ejus alio jure veniunt, de inofficioſo agere non poſſunt. Poſthumi quoque, qui nullo alio jure venire poſſunt, de inofficioſo agere poſſunt.

§ 2. *Adopted children, according to the diſtinction taken in our conſtitution, are admited, as well as natural children, to complain againſt a teſtament, as inofficious, if they can obtain the effects of the deceaſed no other way; but, if they can get the whole or a part of the inheritance by any other means, they then cannot bring a complaint of undutifulneſs againſt the teſtament. Poſthumous children alſo, who are unable to recover their inheritance by any other method, are allowed to bring this complaint.*

Secundum

Secundum noſtræ conſtitutionis diviſionem] *vid. Cod. 8. t. 48. l. 10.*

Si nullo alio jure.] When a complaint againſt a teſtament, as inofficious, is well founded, it affects the character and memory of the deceaſed, who cannot be thought to have acted as became him: this complaint therefore was regarded as an extraordinary remedy, and never allowed to be made, but by thoſe, who had no other: and thus emancipated children, who had been pretermited in the teſtament of their father could not complain of that teſtament as inofficious, becauſe the *Prætorian* law gave them another remedy; to wit, the poſſeſſion of the goods, contrary to the letter of the teſtament. *vid. Vinn. h. t.*

De eo, cui teſtator aliquid reliquit.

§ III. Sed hæc ita accipienda ſunt, ſi nihil eis penitus a teſtatoribus teſtamento relictum eſt: quod noſtra conſtitutio ad verecundiam naturæ introduxit. Sin vero quantacunque pars hæreditatis, vel res, eis fuerit relicta, de inofficioſo querela quieſcente, id, quod eis deeſt, uſque ad quartam legitimæ partis repleatur, licet non fuerit adjectum, boni viri arbitratu debere eam compleri.

§ 3. *What we have hitherto ſaid muſt be underſtood to take place only, when nothing has been left by the will of the deceaſed*; [*and this hath been introduced by our conſtitution out of reverence to parents and the ties of nature:*] *for, if any ſingle thing, or the leaſt part of an inheritance, hath been bequeathed to thoſe, who have a right to a fourth part or legitime portion of the teſtator's eſtate, they are barred from bringing a querele or complaint againſt the teſtament, as undutiful, but are intituled by action to recover whatever ſum is wanting to complete their legitime, altho' it was not added by the teſtator*, that their legitime portion ſhould be completed according to the arbitration of ſome perſon of an approved character.

Conſtitutio ad verecundiam.] *vid. Cod. 3. t. 28. l. 30.*

Si tutor, cui nihil a patre relictum, pupilli nomine legatum acceperit.

§ IV. Si tutor nomine pupilli, cujus tutelam gerebat, ex teſtamento patris ſui legatum acceperit, cum nihil erat ipſi tutori relictum a patre ſuo; nihilominus poterit nomine ſuo de inofficioſo patris teſtamento agere.

§. 4. *If a tutor ſhould accept a legacy in the name of his pupil, in conſequence of a bequeſt made in the teſtament of ſuch tutor's father, who left nothing to his ſon; the tutor may neverthelefs complain in his own name againſt the teſtament of his father, as undutiful.*

Si de inofficioſo nomine pupilli agens ſuccubuerit.

§ V. Sed, ſi e contrario pupilli nomine, cui nihil relictum fuerat, de inofficioſo egerit et ſuperatus eſt, ipſe tutor, quod ſibi in teſtamento eodem relictum eſt, non amittit.

§ 5. *And, on the contrary, if a tutor ſhould bring a complaint of undutifulneſs in the name of his pupil, againſt the teſtament of his pupil's father, who left nothing to his ſon, and this teſtament ſhould be confirmed by ſentence, yet the tutor would not af-*

terwards be barred, on account of this proceeding, from taking whatever was left him in that teſtament, which he controverted only for the benefit of his pupil and by virtue of his office.

De quarta legitimæ partis.

§ VI. Igitur quartam quis debet habere, ut de inofficioſo agere non poſſit, ſive jure hæreditario, ſive jure legati vel fidei-commiſſi, vel ſi mortis cauſa ei quarta donata fuerit, vel inter vivos in iis tantummodo caſibus, quorum mentionem noſtra facit conſtitutio, vel aliis modis, qui in noſtris conſtitutionibus continentur. Quod autem de quarta diximus, ita intelligendum eſt, ut, ſive unus fuerit, ſive plures, quibus agere de inofficioſo teſtamento permittitur, una quarta eis dari poſſit, ut ea pro rata eis diſtribuatur, id eſt, pro virili portione quarta.

§. 6. *No perſon, who hath right, can be hindered from bringing a complaint of undutifulneſs, unleſs he hath in ſome manner received his fourth or legitime part, as by being appointed heir, by having a legacy, or by means of a truſt for his uſe; or unleſs his legitime part hath been given him by donation* propter mortem, *or even* inter vivos, [*in thoſe caſes, of which our conſtitution makes mention,*] *or by any other means ſet forth in our ordinances. What we have ſaid of the fourth or legitime is to be ſo underſtood, that, if there are more perſons than one, who have a right to bring a plaint of undutifulneſs againſt a teſtament, yet one fourth will be ſufficient, divided among them all in equal portions.*
Facit conſtitutio.] *vid. Cod. 3. t. 28. l. 35.*

TITULUS DECIMUS-NONUS.

De hæredum qualitate et differentia.

D. xxix. T. 11. C. vi. T. 31.

Diviſio hæredum.

HÆREDES autem aut neceſſarii dicuntur, aut ſui et neceſſarii, aut extranei.

Heirs are divided into three ſorts, called proper; proper *and* neceſſary; *and* ſtrangers.

De hæredibus neceſſariis.

§ I. Neceſſarius hæres eſt ſervus hæres inſtitutus: ideoque ſic appellatur; quia, ſive velit, ſive nolit, omnino poſt mortem teſtatoris protinus liber

liber et neceſſarius hæres fit. Unde, qui facultates ſuas ſuſpectas habent, ſolent ſervum ſuum primo aut ſecundo aut etiam ulteriore gradu hæredem inſtituere: ut, ſi creditoribus ſatis non fiat, potius ejus hæredis bona, quam ipſius teſtatoris, a creditoribus poſſideantur, vel diſtrahantur, vel inter eos dividantur. Pro hoc tamen incommodo illud ei commodum præſtatur, ut ea, quæ poſt mortem patroni ſui ſibi acquiſierit, ipſi reſerventur. Et quamvis bona defuncti non ſufficiant creditoribus, iterum tamen ex ea cauſa res ejus, quas ſibi acquiſierit, non væneunt.

§ 1. *A ſlave, inſtituted by his maſter, is a neceſſary heir; and he is ſo called, becauſe at the death of the teſtator he becomes inſtantly free, and is compellable to take the heirſhip; he therefore, who ſuſpects his circumſtances, commonly inſtitutes his ſlave to be his heir in the firſt, ſecond, or ſome other place; ſo that, if he does not leave a ſum equal to his debts, the goods, which are ſeized, ſold, or divided among his creditors, may rather ſeem to be thoſe of his heir, than his own. But a ſlave, in recompenſe of this diſhonor, is allowed to reſerve to himſelf whatever he hath acquired after the death of his patron; for ſuch acquiſitions are not to be ſold, altho' the goods of the deceaſed are ever ſo inſufficient for the payment of his creditors.*

De ſuis hæredibus.

§ II. Sui autem et neceſſarii hæredes ſunt, veluti filius filia, nepos neptiſve ex filio, et deinceps cæteri liberi, qui in poteſtate morientis modo fuerint. Sed, ut nepos neptiſve ſui hæredes ſint, non ſufficit eum eamve in poteſtate avi mortis tempore fuiſſe: ſed opus eſt, ut pater ejus vivo patre ſuo deſierit ſuus hæres eſſe, aut morte interceptus, aut qualibet alia ratione liberatus a patria poteſtate: tunc enim nepos neptiſve in locum patris ſui ſuccedit. Sed ſui quidem hæredes ideo appellantur, quia domeſtici hæredes ſunt, et vivo quoque patre quodammodo domini exiſtimantur. Unde etiam, ſi quis inteſtatus moriatur, prima cauſa eſt in ſucceſſione liberorum. Neceſſarii vero ideo dicuntur, quia omnino, ſive velint, ſive nolint, tam ab inteſtato quam ex teſtamento, ex lege duodecim tabularum hæredes fiunt. Sed his prætor permittit volentibus abſtinere hæreditate, ut potius parentis quam ipſorum bona ſimiliter a creditoribus poſſideantur.

§ 2. *Proper and neceſſary heirs are ſons, daughters, grandſons or grand-daughters by a ſon or any other deſcendents in the direct line, who were in the power of the deceaſed at the time of his death. But, in order to conſtitute grandchildren proper or domeſtic heirs, it does not ſuffice, that they were in the power of their grandfather at the time of his deceaſe; but it is requiſite, that their father ſhould have ceaſed to be a proper heir in the life-time of his father, by having been freed, either by death or ſome other means, from paternal authority; for then it is, that the grandſon or grand-daughter ſucceeds in the place of their father. And note, that heirs are called* ſui *or proper, becauſe they are domeſtic; and in the very life-time of their father are reputed maſters or proprietors of the inheritance in a certain degree. Hence it is, that, if a*

man dies inteſtate, his children are prefered before all others to the ſucceſſion; and are called neceſſary heirs, becauſe, willing or unwilling, they become the heirs of their parent according to the law of the 12 *tables, either by virtue of a teſtament or in conſequence of an inteſtacy. But, when children requeſt it, the prætor permits them to abſtain from the inheritance, that the effects of their parents, rather than their own, may be ſeized by the creditors.*

De extraneis.

§ III. Cæteri, qui teſtatoris juri ſubjecti non ſunt, extranei hæredes appellantur. Itaque liberi noſtri, qui in poteſtate noſtra non ſunt, hæredes a nobis inſtituti, extranei hæredes nobis videntur. Qua de cauſa et qui hæredes a matre inſtituuntur eodem numero ſunt: quia fœminæ in poteſtate liberos non habent. Servus quoque hæres a domino inſtitutus, et poſt factum teſtamentum ab eo manumiſſus, eodem numero habetur.

§ 3. *But all other heirs, not ſubject to the power of the teſtator at the time of his death, are called ſtrangers: thus even children, who are not under the power of their father, but yet are conſtituted his heirs, are reckoned ſtrangers in a legal ſenſe: and, for the ſame reaſon, children, inſtituted heirs by their mother, are alſo reputed ſtrangers; for a woman is not allowed to have her children under her own power. A ſlave alſo, whom his maſter hath inſtituted by teſtament and afterwards manumited, is numbered among thoſe heirs, who are called ſtrangers.*

De teſtamenti factione.

§ IV. In extraneis hæredibus illud obſervatur, ut ſit cum eis teſtamenti factio, ſive hæredes ipſi inſtituantur, ſive ii, qui poteſtate eorum ſunt. Et id duobus temporibus inſpicitur: teſtamenti quidem facti tempore, ut conſtiterit inſtitutio: mortis vero teſtatoris, ut effectum habeat. Hoc amplius, et, cum adit hæreditatem, eſſe debet cum eo teſtamenti factio, ſive pure ſive ſub conditione hæres inſtitutus ſit. Nam jus hæredis eo maxime tempore inſpiciendum eſt, quo acquirit hæreditatem. Medio autem tempore, inter factum teſtamentum et mortem teſtatoris vel conditionem inſtitutionis exiſtentem, mutatio juris non nocet hæredi: quia, ut diximus, tria tempora inſpici debent. Teſtamenti autem factionem non ſolum is habere videtur, qui teſtamentum facere poteſt: ſed etiam, qui ex alieno teſtamento vel ipſe capere poteſt vel alii acquirere, licet non poſſit facere teſtamentum. Et ideo furioſus, et mutus, et poſthumus, et infans, et filius-familias, et ſervus alienus, teſtamenti factionem habere dicuntur. Licet enim teſtamentum facere non poſſint: attamen ex teſtamento vel ſibi vel alii acquirere poſſunt.

§ 4. *In regard to ſtrangers, it is requiſite, that they ſhould be capable of the faction of a teſtament, whether they are inſtituted heirs themſelves, or whether thoſe, under their power, are inſtituted. And this qualification is required at two ſeveral*

times

times; —— at the time of making the teſtament, that the inſtitution may be valid; and at the time of the teſtator's death, that ſuch inſtitution may take effect: and farther, whether an heir is appointed ſimply or conditionally, yet he ought to be capable of the faction of a teſtament at the time of entering upon the inheritance; for his right is principally regarded at the time of acquiring the poſſeſſion. But, in the intermediate time, between the making of the teſtament and the death of the teſtator, or the completion of the condition of the inſtitution, the heir will not be prejudiced by incapacity or change of ſtate; becauſe the three particular times, which we have mentioned, are the times to be regarded. But a man, capable of giving his effects by teſtament, is not the only perſon, who is ſaid to have teſtamenti factionem; *for whoever is capable of taking for the benefit of himſelf, or of acquiring by teſtament for the benefit of another, is alſo underſtood to have the faction of a teſtament: and therefore perſons mad, mute, or poſthumous, alſo infants, the ſons of a family, or ſlaves not your own, may all be ſaid to have the faction of a teſtament in it's paſſive ſignification. For, altho' ſuch perſons are incapable of making a teſtament, yet they are capable of acquiring by teſtament, either for themſelves or others.*

De jure deliberandi, et de beneficio inventarii.

§ V. Extraneis autem hæredibus deliberandi poteſtas eſt de adeunda hæreditate vel non adeunda. Sed, ſive is, cui abſtinendi poteſtas eſt, immiſcuerit ſe bonis hæreditatis, ſive extraneus, cui de adeunda hæreditate deliberare licet, adierit, poſtea relinquendæ hæreditatis facultatem non habet, niſi minor ſit 25 annis: nam hujuſmodi ætatis hominibus, ſicut in cæteris omnibus cauſis, deceptis, ita et ſi temere damnoſam hæreditatem ſuſceperint, prætor ſuccurrit. Sciendum eſt tamen, Divum Hadrianum etiam majori 25 annis veniam dediſſe, cum poſt aditam hæreditatem grande æs alienum, quod aditæ hæreditatis tempore latebat, emerſiſſet. Sed hoc quidem Divus Hadrianus cuidam ſpeciali beneficio præſtitit. Divus autem Gordianus poſtea militibus tantummodo hoc conceſſit. Sed noſtra benevolentia commune omnibus ſubjectis imperio noſtro hoc beneficium præſtitit: et conſtitutionem tam æquiſſimam quam nobiliſſimam ſcripſit, cujus tenorem ſi obſervaverint homines, licet eis adire hæreditatem, et in tantum teneri, quantum valere bona hæreditatis contingit: ut ex hac cauſa neque deliberationis auxilium ſit eis neceſſarium, niſi, omiſſa obſervatione noſtræ conſtitutionis, et deliberandum exiſtimaverint, et ſeſe veteri gravamini aditionis ſupponere maluerint.

§ 5. *Strangers, who are appointed heirs, have the power of deliberating, whether they will, or will not, enter upon an inheritance. But, if even a proper or domeſtic heir, who has the liberty of abſtaining, ſhould intermeddle, or, if a ſtranger, who is permited to deliberate, ſhould once take an inheritance, it will not afterwards be in his power to renounce it, unleſs he was under the age of 25 years: for the prætor, who in all other caſes relieves minors, who have been deceived, affords them alſo his aſſiſtence, when they raſhly take upon themſelves an injurious inheritance. And here it muſt be noted, that the emperor* Adrian *once gave permiſſion to a major, or perſon of full*

full age, to relinquiſh an inheritance, when it appeared to be incumbered with a great debt, which had been concealed, till the heir had taken upon himſelf the adminiſtration. But this permiſſion was granted as a very ſpecial inſtance of benificence. The emperor Gordian *afterwards promulged a conſtitution for the indemnification of heirs, yet confined the force of it to thoſe only, who were of the ſoldiery. But our extended benevolence hath rendered this benefit common to all our ſubjects in general, having dictated a conſtitution both juſt and noble, which, if heirs will ſtrictly obſerve, they may enter upon their inheritance, and not be made farther chargeable, than the value of the eſtate will extend; ſo that they are under no neceſſity of praying a time for deliberation, unleſs they omit to obſerve the tenor of our ordinance, chuſing rather to deliberate and ſubmit themſelves to the danger attending the acceptance of an inheritance according to the antient law.*

Sed noſtra benevolentia.] The power of deliberating was obtained after the following manner: — the heir, who was called to a ſucceſſion, either by virtue of a teſtament or by a right to ſucceed *ab inteſtato*, made application to a magiſtrate for a time to deliberate, upon which a delay was always granted him of at leaſt an hundred days, in which he might examine the circumſtances of the deceaſed; and, by the antient law, the teſtator himſelf might have fixed a certain time, in which his appointed heir muſt either take the inheritance, or, by ſuffering that time to elapſe, intirely exclude himſelf. This appointment of a certain time was called *Cretion*, [from *crevi* a *cernere* to decree] and was afterwards forbidden by the emperors *Arcadius*, *Honorius*, and *Theodoſius*, in theſe words. "*Scru-*
"*puloſam Cretionum ſolennitatem hac lege penitus*
"*amputari decernimus.* Cod. 6. t. 30. l. 17."

This power of deliberating was of no other uſe than to give the heir time to examine the affairs of the deceaſed; at the expiration of which, the heir was obliged either to accept the inheritance ſimply, or renounce it, without being at liberty to chuſe any middle way; and from hence followed many inconveniences to legataries and creditors, as well as to heirs. — The law however continued the ſame, and heirs were without remedy, except that given by the emperor *Gordian* to the ſoldiery, till the reign of *Juſtinian*; who eſtabliſhed, in favor of heirs in general, a liberty of accepting an inheritance with the benefit of an inventary; *i. e.* on condition, that they ſhall not be liable to actions beyond the value of the goods, of which an inventary ought to be made by a public officer; the effect of which is, that creditors, legataries, and other perſons concerned, may have a juſt account of all the goods; and that the heir does not engage his own eſtate, but obliges himſelf only to be anſwerable for what is contained in the inventary; yet the benefit of an inventary has not aboliſhed the uſe of deliberating. *Cod.* 6. *t.* 30. *l. ult. Domat. lib.* 1. *t.* 2. *part* 2.

In *England* all executors and adminiſtrators are allowed the benefit of an inventary of courſe, and are ſuppoſed to accept the ſucceſſion always under that benefit; ſo that, if they exhibit an inventary upon oath, they are no farther accountable than for what is contained in that inventary, unleſs the creditors or legatees can prove, that there are more goods belonging to the ſucceſſion, than are ſet down in the inventary, in which caſe the executors or adminiſtrators will be obliged to charge themſelves; but, if an executor will make no inventary, then every legatary may recover his whole legacy; for, in this caſe, the law preſumes, that there are ſufficient effects to pay all the legacies, and that the executor hath fraudulently ſubſtracted them; whereas, when an inventary is given, the executor is preſumed not to have any more of the teſtator's goods in his poſſeſſion, than were deſcribed in the inventary, if lawfully made. *Swin.* part. 3. ſec. 17. page 228.

Et conſtitutionem tam æquiſſimam.] *vid. Cod.* 6. *t.* 30. *l.* 22.

De acquirenda vel omittenda hæreditate.

§ VI. Item extraneus hæres teſtamento inſtitutus, aut ab inteſtato ad legitimam hæreditatem vocatus, poteſt aut pro hærede gerendo, aut etiam nuda voluntate ſuſcipiendæ hæreditatis, hæres fieri. Pro hærede autem gerere quis videtur, ſi rebus hæreditariis tanquam hæres utatur, vel vendendo res hæreditarias, vel prædia colendo, locandove: et quo-

quo

quoquo modo voluntatem ſuam declaret, vel re, vel verbo, de adeunda hæreditate: dummodo ſciat, eum, in cujus bonis pro hærede gerit, teſtatum inteſtatumve obiiſſe, et ſe ei hæredem eſſe. Pro hærede enim gerere eſt pro domino gerere. Veteres enim hæredes pro dominis appellabant. Sicut autem nuda voluntate extraneus hæres fit, ita contraria deſtinatione ſtatim ab hæreditate repellitur. Eum, qui ſurdus vel mutus natus vel poſtea factus eſt, nihil prohibet pro hærede gerere, et acquirere ſibi hæreditatem; ſi tamen intelligit, quod agit.

§ 6. *A ſtranger, who is inſtituted by teſtament, or called by law to take a ſucceſſion in caſe of an inteſtacy, may make himſelf accountable as heir, either by doing ſome act as ſuch; or by barely ſignifying his acceptance of the heirſhip. And a man is deemed to act, as the heir of an inheritance, if he treats it as his own, by ſelling any part of it, by cultivating the ground, or by tilling it; or even if he declares his conſent to accept it in any manner, either by act or ſpeech; when he knows, at the ſame time, that the perſon, with whoſe eſtate he intermeddles, is dead teſtate or inteſtate, and that he himſelf is the heir: for to act as heir is to act as proprietor; and the antients frequently uſed the term heir, when they would denote the proprietor of an eſtate. But as a ſtranger may become an heir by a bare conſent only, ſo on the contrary, by a mere diſſent, he may bar himſelf from an inheritance. And nothing prevents, but that a perſon, who was born deaf and dumb, or became ſo by accident, may, by acting as heir, either acquire the advantages or bring upon himſelf the diſadvantages of an inheritance, if he was ſenſible of what he was doing, and that he was acting in the capacity of an heir.*

Item extraneus hæres.] The law of *England* takes no notice of proper or domeſtic heirs, and therefore can make no diſtinction between *ſui hæredes* and *extranei*; but, in *England*, if an executor [who may be regarded as the heir of perſonal eſtate] once intermeddles with the eſtate of the teſtator, he ſhall not afterwards be permitted to renounce his executorſhip; and yet he is not liable *de bonis propriis* to pay more than he has received, unleſs in ſome particular caſes, as when he hath waſted the eſtate of the deceaſed, or acted otherwiſe improperly and diſhoneſtly — and even an executor *de ſon tort* ſhall in general be charged only to the amount of the goods wrongfully adminiſtered by him. 1 Mod. 213. *Parten* v. *Baſeden*.—Swinb. 337.

TITULUS VIGESIMUS.

De legatis.

D. xxx. xxxi. xxxii. C. vi. T. 37.

Continuatio.

POST hæc videamus de legatis: quæ pars juris extra propoſitam quidem materiam videtur: nam loquimur de iis juris figuris, quibus per univerſitatem res nobis acquiruntur: ſed, cum omnino de teſtamentis et de hæredibus, qui in teſtamento inſtituuntur, loquuti ſimus, non ſine cauſa ſequenti loco poteſt hæc juris materia tractari.

After what has been ſaid, we will make ſome obſervations upon the doctrine of legacies; altho' a diſcuſſion of this part of the law may not ſeem exactly to fall in with the ſubject propoſed; for we are treating only of thoſe legal methods, by which things may be acquired univerſally: but, as we have already ſpoken at large of teſtaments and teſtamentary heirs, it is not without reaſon, that we intend to treat of legacies in the following paragraphs.

Definitio.

§ I. Legatum itaque eſt donatio quædam a defuncto relicta, ab hærede præſtanda.

§ 1. *A legacy is a ſpecies of donation, which is left or ordered by the deceaſed; and, if poſſible, muſt be performed by his heir.*

De antiquis generibus legatorum ſublatis.

§ II. Sed olim quidem erant legatorum genera quatuor: per vindicationem, per damnationem, ſinendi modo, per præceptionem: et certa quædam verba cuique generi legatorum aſſignata erant, per quæ ſingula genera legatorum ſignificabantur: ſed ex conſtitutionibus Divorum principum ſolemnitas hujuſmodi verborum ſublata eſt. Noſtra autem conſtitutio, quam cum magna fecimus lucubratione, defunctorum voluntates validiores eſſe cupientes, et non verbis ſed voluntatibus eorum faventes, diſpoſuit, ut omnibus una ſit natura, et, quibuſcunque verbis aliquid relictum ſit, liceat legatariis id perſequi, non ſolum per actiones perſonales, ſed etiam per in rem et per hypothecariam. Cujus conſtitutionis perpenſum modum ex ipſius tenore perfectiſſime accipere poſſibile eſt.

§ 2. *An-*

§ 2. *Antiently there were four kinds of legacies in uſe*; *namely* — per vindicationem — per damnationem — ſinendi modo — *and* per præceptionem. *And to each of theſe was aſſigned a certain form of words, by which their different ſpecies were ſignified*; *but theſe fixed forms have been wholly taken away by the imperial ordinance of the later emperors*, Conſtantinus, Conſtantius, *and* Conſtans. *And we alſo, being deſirous, that the wills of deceaſed perſons might be corroborated, and that their intentions ſhould be more regarded than their words, have with great care and ſtudy compoſed a conſtitution, which enacts, that the nature of all legacies ſhall be the ſame*; *and that legataries, by whatever words they are conſtituted, may ſue for what is left them, not only by a perſonal, but by a real or hypothecary action. But the reader may moſt perfectly comprehend the well weighed matter of this conſtitution, by peruſing the tenor of it.*

Sed ex conſtitutionibus.] *vid. Cod.* 6. *t.* 37. *l.* 21.
Noſtra autem conſtitutio.] *vid. Cod.* 6. *t.* 43. *l.* 1.

Collatio legatorum et fidei-commiſſorum.

§ III. Sed non uſque ad eam conſtitutionem ſtandum eſſe exiſtimavimus: cum enim antiquitatem invenimus legata quidem ſtricte concludentem, fidei-commiſſis autem, quæ ex voluntate magis deſcendebant defunctorum, pinguiorem naturam indulgentem, neceſſarium eſſe duximus, omnia legata fidei-commiſſis exæquare, ut nulla ſit inter ea differentia, ſed, quod deeſt legatis, hoc repleatur ex natura fidei-commiſſorum: et, ſi quid amplius eſt in legatis, per hoc creſcat fidei-commiſſorum natura. Sed, ne in primis legum cunabulis permiſtim de his exponendo ſtudioſis adoleſcentibus quandam introducamus difficultatem, operæ pretium eſſe duximus interim ſeparatim prius de legatis et poſtea de fidei-commiſſis tractare; ut, natura utriuſque juris cognita, facile poſſint permiſtionem eorum eruditi ſubtilioribus auribus accipere.

§ 3. *But we have judged it expedient, that our conſtitution ſhould not reſt here, but extend ſtill farther: for, when we obſerved, that the antients confined legacies within very ſtrict rules, and yet were extremely favorable to gifts in truſt, it was thought neceſſary to make all legacies equal to gifts in truſt, that no difference in effect ſhould remain between them*; *ſo that whatever is deficient in the nature of legacies may be ſupplied by the nature of truſts, and whatever is abundant in the nature of legacies may become an accretion to the nature of truſts.*——*But, that we may not raiſe difficulties, and perplex the minds of young perſons at their entrance upon the ſtudy of the law, by explaining theſe things promiſcuouſly, we have eſteemed it worth our pains to treat ſeparately firſt of legacies and afterwards of truſts, that, the nature of both being known, the ſtudent, thus inſtructed, may more eaſily underſtand their relation and intermixture.*

Neceſſarium eſſe duximus.] *vid. Cod.* 6. *t.* 43. *Communia de legatis, &c.*

De re legata. Et primum de re teſtatoris, hæredis, aliena, cujus non eſt commerciun.

§ IV. Non ſolum autem teſtatoris vel hæredis res, ſed etiam aliena legari poteſt, ita ut hæres cogatur redimere eam et præſtare; vel, ſi eam non poteſt redimere, æſtimationem ejus dare. Sed, ſi talis ſit res, cujus commercium non eſt, vel adipiſci non poteſt, nec æſtimatio ejus debetur; veluti ſi quis campum martium, vel baſilicas, vel templa, vel, quæ publico uſui deſtinata ſunt, legaverit: nam nullius momenti tale legatum eſt. Quod autem diximus, alienam rem poſſe legari, ita intelligendum eſt, ſi defunctus ſciebat, alienam rem eſſe, non ſi ignorabat. Forſitan enim, ſi ſciviſſet alienam rem eſſe, non legaſſet; et ita Divus Pius reſcripſit. Et verius eſt, ipſum, qui agit, id eſt, legatarium, probare oportere, ſciviſſe alienam rem legare defunctum, non hæredem probare oportere, ignoraſſe alienam: quia ſemper neceſſitas probandi incumbit illi, qui agit.

§ 4. *A teſtator may not only bequeath his own property, or that of his heir, but alſo the property of others; and, if the thing bequeathed belongs to another, the heir can be obliged either to purchaſe and deliver it, or to render the value of it, if it cannot be purchaſed. But, if the thing bequeathed is not in commerce, and what the law will not permit to be purchaſed, the heir in this caſe can never be obliged to pay the value of it to the legatary; as if a man ſhould bequeath to another the* Campus Martius, *the palaces of the prince, the temples, or any of thoſe things, which appertain to the public: for ſuch legacies can be of no moment or efficacy. But, when we ſaid, that a teſtator might bequeath the goods of another man, we would be underſtood to mean, that this can be done only, if the deceaſed knew, that what he bequeathed belonged to another, and not, if he was ignorant of it; ſince, if he had known it, he probably would not have left ſuch a legacy: and to this purpoſe is the reſcript of the emperor* Antoninus. *And it is incumbent upon the party agent or legatary to bring proof, that the deceaſed knew, that what he left belonged to another; for the heir is by no means obliged to prove, that the deceaſed did not know it; becauſe, by the general rule of law, the neceſſity of proving lies upon the complainant.*

De re pignorata

§ V. Sed et, ſi rem obligatam creditori aliquis legaverit, neceſſe habet hæres eam luere. Et in hoc quoque caſu idem placet, quod in re aliena, ut ita demum luere neceſſe habeat hæres, ſi ſciebat defunctus rem obligatam eſſe: et ita Divi Severus et Antoninus reſcripſerunt. Si tamen defunctus voluerit legatarium luere, et hoc expreſſerit, non debet hæres eam luere.

§ 5. *If a man bequeaths a thing, which he hath pledged to a creditor, the heir is under a neceſſity of redeeming it: but in this caſe, as in the former, concerning the goods of another, the heir cannot be obliged to redeem the thing bequeathed, unleſs the deceaſed*

deceaſed knew, that it was pledged; and this the emperors Severus *and* Antoninus *have declared by their reſcript. But nevertheleſs, whenever it appears to have been the expreſs will of the deceaſed, that the legatary ſhould himſelf redeem the thing left to him, then the heir is free from the obligation of doing it.*

De re aliena poſt teſtamentum a legatario acquiſita.

§ VI. Si res aliena legata fuerit, et ejus rei vivo teſtatore legatarius dominus factus fuerit, ſiquidem ex cauſa emptionis, ex teſtamento actione pretium conſequi poteſt; ſi vero ex cauſa lucrativa, veluti ex donatione, vel ex alia ſimili cauſa, agere non poteſt. Nam traditum eſt, duas lucrativas cauſas in eundem hominem et eandem rem concurrere non poſſe. Hac ratione, ſi ex duobus teſtamentis eadem res eidem debeatur, intereſt, utrum rem, an æſtimationem, ex teſtamento conſecutus ſit: nam, ſi rem habet, agere non poteſt; quia habet eam ex cauſa lucrativa: ſi æſtimationem; agere poteſt.

§ 6. *If a thing bequeathed is the property of another, and the legatee becomes the proprietor of it in the life-time of the teſtator, it is neceſſary to be known by what means the legatee became the proprietor; for, if he bought it, he may nevertheleſs recover the price given, by an action in conſequence of the teſtament; but, if he obtained it as a gift, or by any ſuch lucrative title, no action will lie; for it is a maxim, that two lucrative cauſes can never concur in the ſame perſon and thing. And therefore, if the ſame ſpecific thing is left by two teſtaments to one and the ſame perſon, the queſtion will be, when the legatary ſues in virtue of one of the teſtaments, whether he hath obtained the thing itſelf, or the value of it, by virtue of the other? for, if he is already poſſeſſed of the thing itſelf, the ſuit is at an end, becauſe he hath received it on a lucrative account; but, if he hath obtained the value of it only from the heir of one of the teſtators, he may bring an action for the thing itſelf, againſt the heir of the other.*

Nam traditum eſt.] When it is ſaid, that two lucrative titles can never concur in the ſame perſon on account of the ſame thing, this muſt be underſtood in regard only to ſomething certain and determinate, as a particular purſe of money, an horſe, a diamond, &c. for the maxim does not hold in general with reſpect to things, which conſiſt in quantity, and may be numbered, weighed or meaſured — *Poſſunt enim duæ cauſæ lucrativæ in eandem perſonam et eandem quantitatem concurrere, quia quantitates per rerum naturam multiplicantur; licet enim eadem res mea ſæpius fieri non poſſit, eadem tamen quantitas poſſit, quia res eadem non videtur.* Cujacius, hic riere.

De his, quæ non ſunt in rerum natura.

§ VII. Ea quoque res, quæ in rerum natura non eſt, ſi modo futura eſt, recte legatur; veluti fructus, qui in illo fundo nati erunt, aut quod ex illa ancilla natum erit.

§ 7. *Things, which do not exiſt, may be rightly bequeathed, if there is but a poſſibility, that they may exiſt: thus a man may deviſe the fruits, which ſhall grow on ſuch a ſpot of ground; or the offspring, which ſhall be born of a particular ſlave.*

De eadem re duobus legata.

§ VIII. Si eadem res duobus legata ſit, ſive conjunctim ſive disjunctim, ſi ambo perveniant ad legatum, ſcinditur inter eos legatum: ſi alter deficiat, quia aut ſpreverit legatum, aut vivo teſtatore deceſſerit, vel alio quoquo modo defecerit, totum ad collegatarium pertinet. Conjunctim autem legatur, veluti ſi quis dicat, *Titio et Seio hominem Stichum do, lego:* disjunctim ita, *Titio hominem Stichum do, lego: Seio hominem Stichum do, lego.* Sed et, ſi expreſſerit *eundem hominem Stichum*, æque disjunctim legatum intelligitur.

§ 8. *When the ſame ſpecific legacy is left to two perſons either conjunctively or disjunctively, if they are both willing to accept it, it muſt be divided between them. But, if one of the legatees dies in the life-time of the teſtator, diſlikes his legacy, or is by any means prevented from taking it, the whole veſts in his co-legatee. A legacy thus worded is in the conjunctive* — I give and bequeath my ſlave STICHUS to TITIUS *and* SEIUS—*but a legacy, worded as follows, is in the disjunctive*:—I give and bequeath my ſlave STICHUS to TITIUS: I give and bequeath my ſlave STICHUS to SEIUS. *And, altho' the teſtator ſhould add, that he gives the* ſame ſlave STICHUS to SEIUS, *yet the legacy would nevertheleſs be underſtood to be left in the disjunctive.*

Si legatarius proprietatem fundi alieni ſibi legati emerit et uſusfructus ad eum pervenerit.

§ IX. Si cui fundus alienus legatus ſit, et emerit proprietatem deducto uſufructu, et uſusfructus ad eum pervenerit, et poſtea ex teſtamento agat, recte eum agere et fundum petere Julianus ait: quia uſusfructus in petitione ſervitutis locum obtinet: ſed officio judicis continetur, ut deducto uſufructu jubeat æſtimationem præſtari.

§ 9. *If a man hath bequeathed the ground of another, and the legatary hath purchaſed the property of that ground without the uſufruct, which hath alſo afterwards accrued to him, it is ſaid by* Julianus, *that the legatary may rightly bring an action by virtue of the teſtament, and demand the ground, becauſe the uſufruct is regarded as a ſervice only. But it is the duty of a judge, in this caſe, to order the price of the property of the ground to be paid, the value of the uſufruct being deducted.*

De re legatarii.

§ X. Sed, ſi rem legatarii quis ei legaverit, inutile eſt legatum: quia, quod proprium eſt ipſius, amplius ejus fieri non poteſt. Et, licet alienaverit eam, non debetur, nec ipſa res, nec æſtimatio ejus.

§ 10. *If a man bequeaths to another what already belongs to him, the legacy is ineffectual; for that, which is already the property of a legatee, can by no means become more ſo. And, if the legatee ſhould, after the bequeſt, alien the thing bequeathed, neither the thing itſelf, nor even the value of it, would become due to him from the heir of the teſtator.*

Siquis

Si quis rem ſuam, quaſi non ſuam, legaverit.

§ XI. Si quis rem ſuam quaſi alienam legaverit, valet legatum: nam plus valet quod in veritate eſt, quam quod in opinione. Sed et, ſi legatarii eſſe putavit, valere conſtat: quia exitum voluntas defuncti habere poteſt.

§ 11. *If a teſtator ſhould bequeath what is his own, as if it was the property of another, the bequeſt would nevertheleſs be good; for truth is more prevalent than what is founded upon opinion only. But even ſuppoſe the teſtator to imagine, that what he bequeaths belongs already to the legatary, yet, if it does not, it is certain, that ſuch a legacy would alſo be valid; becauſe the will of the deceaſed can thus take effect.*

De alienatione et oppignoratione rei legatæ.

§ XII. Si rem ſuam legaverit teſtator, poſteaque eam alienaverit, Celſus putat, ſi non adimendi animo vendidit, nihilominus deberi: idemque Divi Severus et Antoninus reſcripſerunt. Iidem reſcripſerunt, eum, qui poſt teſtamentum factum prædia, quæ legata erant, pignori dedit, ademiſſe legatum non videri: et ideo legatarium cum hærede ejus agere poſſe, ut prædia a creditore luantur. Si vero quis partem rei legatæ alienaverit, pars, quæ non eſt alienata, omnino debetur: pars autem alienata ita debetur, ſi non adimendi animo alienata ſit.

§ 12. *But, if a teſtator bequeaths what is his own property, and afterwards alienates it, it is the opinion of* CELSUS, *that the thing bequeathed will nevertheleſs become due to the legatee, if the teſtator did not diſpoſe of it, with an intention to ouſt him. The emperors* Severus *and* Antoninus *have publiſhed their reſcript to this effect; and they have alſo ſignified by another reſcript, that whoever has bequeathed a legacy, and hath afterwards pawned or mortgaged it, ſhall not be deemed to have retracted it; and that the legatee may therefore of courſe bring an action againſt the heir, and oblige him to redeem. And, if a teſtator ſhall have aliened but a part of the thing bequeathed, then all that part, which remains unaliened, is ſtill due; and that, which is alienad, is only due, when it appears not to have been aliened by the teſtator with a deſign to retract the legacy.*

De liberatione legata.

§ XIII. Si quis debitori ſuo liberationem legaverit, legatum utile eſt: et neque ab ipſo debitore, neque ab hærede ejus, poteſt hæres petere, neque ab alio, qui hæredis loco ſit. Sed et poteſt a debitore conveniri, ut liberet eum. Poteſt etiam quis vel ad tempus jubere, ne hæres petat.

§ 13. *If a man by will bequeaths a diſcharge to his debtor, the bequeſt is effectual; and the heir can bring no ſuit againſt the debtor, or his heir, or any one, who repreſents him: but, on the contrary, the heir of the teſtator may be convened by the debtor, and obliged to give him his diſcharge. A man may alſo by teſtament command his heir not to ſue a debtor, within a time limited.*

D

De debito legato creditori.

§ XIV. Ex contrario ſi debitor creditori ſuo, quod debet, legaverit, inutile eſt legatum, ſi nihil plus eſt in legato, quam in debito: quia nihil amplius per legatum habet. Quod ſi in diem, vel ſub conditione, debitum ei pure legaverit, utile eſt legatum propter repræſentationem. Quod ſi vivo teſtatore dies venerit, vel conditio extiterit, Papinianus ſcripſit utile eſſe nihilominus legatum, quia ſemel conſtitit: quod et verum eſt. Non enim placuit ſententia exiſtimantium, extinctum eſſe legatum, quia in eam cauſam pervenerit, a qua incipere non poteſt.

§ 14. *On the contrary, if a debtor bequeaths by teſtament to his creditor the money, which he owes him, this legacy is ineffectual, if the value of the legacy amounts but merely to the value of the debt; for thus the creditor can receive no benefit from the legacy. But, if a debtor bequeaths ſimply to his creditor a ſum of money, which was to be paid at a day certain, or which he owed upon condition, the legacy will take effect on account of the repreſentation,* i. e. *on account of the immediate payment, the legacy becoming due before the debt.* — *But, according to* PAPINIAN, *if the day of payment ſhould come, or the event of the condition happen in the life-time of the teſtator, the legacy would nevertheleſs be effectual, becauſe it was once good; which is true. For we are by no means ſatisfied with the opinion of thoſe, who imagine, that a legacy once good, may afterwards become extinct, by falling into a ſtate, from which it could not have taken a legaly commencement.*

De dote uxori legata.

§ XV. Sed, ſi uxori maritus dotem legaverit, valet legatum: quia plenius eſt legatum, quam de dote actio. Sed, ſi, quam non accepit, dotem legaverit, Divi Severus et Antoninus reſcripſerunt, ſiquidem ſimpliciter legaverit, inutile eſſe legatum; ſi vero certa pecunia, vel certum corpus, aut inſtrumenta dotis in prælegando demonſtrata ſunt, valere legatum.

§ 15. *If a man gives back to his wife by legacy her marriage portion, the legacy is valid: for ſuch a legacy is more beneficial to her than the action, which ſhe might maintain for the recovery of her portion. But, if an huſband bequeaths to his wife her marriage portion, and hath never actually received it, the emperors* Severus *and* Antoninus *have declared by their reſcript, that, if it is left ſimply without any ſpecification of a ſum certain, the legacy is void; but that, if any certain ſum, or thing is ſpecified, or if the inſtruments, in which the exact value of the portion is mentioned, are referred to, the legacy is valid.*

De interitu et mutatione rei legatæ.

§ XVI. Si res legata ſine facto hæredis perierit, legatario decedit. Et, ſi ſervus alienus legatus ſine facto hæredis manumiſſus fuerit, non tenetur hæres. Si vero hæredis ſervus legatus ſit, et ipſe eum manumiſerit, teneri eum, Julianus ſcripſit: nec intereſt, ſciverit, an ignoraverit, a ſe eum legatum eſſe. Sed et, ſi alii donaverit ſervum, et is, cui donatus eſt,

eum

eum manumiſerit, tenetur hæres: quamvis ignoraverit, a ſe eum legatum eſſe.

§ 16. *If a thing bequeathed ſhould periſh before delivery, otherwiſe than by the act or fault of the heir, the loſs muſt fall upon the legatary. And, if the ſlave of another, who is bequeathed, ſhould be manumited, and the heir hath not been acceſſary to the manumiſſion, he can be ſubject to no action. But, if a teſtator bequeaths the ſlave of his heir, who afterwards manumits that ſlave, it is the opinion of* JULIAN, *that the heir is anſwerable: nor is at all material, whether he did or did not know of the legacy. And alſo, if the heir hath made a preſent of a ſlave bequeathed, and the donee hath manumited him, the heir is liable to an action, altho' he was ignorant of the bequeſt.*

De interitu quarundam ex pluribus rebus legatis.

§ XVII. Si quis ancillas cum ſuis natis legaverit, etiamſi ancillæ mortuæ fuerint, partus legato cedunt. Idem eſt et ſi ordinarii ſervi cum vicariis legati fuerint: quia, licet mortui ſint ordinarii, tamen vicarii legato cedunt. Sed, ſi ſervus fuerit cum peculio legatus, mortuo ſervo, vel manumiſſo, vel alienato, peculii legatum extinguitur. Idem eſt, ſi fundus inſtructus, vel cum inſtrumento, legatus fuerit: nam, fundo alienato, et inſtrumenti legatum extinguitur.

§ 17. *If a teſtator gives by legacy his female ſlaves and their offspring, altho' the ſlaves die, yet their iſſue will become due to the legatary: and the ſame obtains, if ordinary ſlaves are bequeathed together with vicarial; for altho' the ordinary ſlaves die, yet the vicarial ſlaves will paſs by virtue of the bequeſt. But, if a ſlave is bequeathed with his* peculium, *and afterwards dies, or is manumited, or aliened, the legacy of the* peculium *becomes extinct. And the conſequences will be the ſame, if a piece of ground is bequeathed with the inſtruments for improving it; for, if the teſtator aliens the ground, the legacy of the inſtruments of huſbandry is of courſe extinguiſhed.*

De grege legato.

§ XVIII. Si grex legatus fuerit, et poſtea ad unam ovem pervenerit, quod ſuperfuerit, vindicari poteſt. Grege autem legato etiam eas oves, quæ poſt teſtamentum factum gregi adjiciuntur, legato cedere Julianus ait. Eſt autem gregis unum corpus ex diſtantibus capitibus, ſicut ædium unum corpus eſt ex cohærentibus lapidibus.

§ 18. *If a flock is bequeathed, and afterwards reduced to a ſingle ſheep, that ſheep is claimable; and, if a flock receives an increaſe or addition, after it hath been diſpoſed of by teſtament, the increaſe or addition will alſo, according to* Julian, *become due to the legatary. For a flock is deemed one body, conſiſting of ſeparate members, as an houſe is reckoned one body, compoſed of materials, joined together and adhering.*

De ædibus legatis.

§ XIX. Ædibus denique legatis, columnas et marmora, quæ poſt teſtamentum factum adjecta ſunt, legato dicimus cedere.

§ 19. *And laſtly, when an houſe is bequeathed, the marble or pillars, which are added after the bequeſt is made, will paſs under the general legacy.*

De peculio.

§ XX. Si peculium legatum fuerit, ſine dubio quicquid peculio accedit vel decedit, vivo teſtatore, legatarii lucro vel damno eſt. Quod ſi poſt mortem teſtatoris ante aditam hæreditatem aliquid ſervus acquiſierit, Julianus ait, ſiquidem ipſi manumiſſo peculium legatum fuerit, omne, quod ante aditam hæreditatem acquiſitum eſt, legatario cedere; quia hujuſmodi legati dies ab adita hæreditate cedit: ſed, ſi extraneo peculium legatum fuerit, non cedere ea legato, niſi ex rebus peculiaribus auctum fuerit peculium. Peculium autem, niſi legatum fuerit, manumiſſo non debetur: quamvis, ſi vivus manumiſerit, ſufficit, ſi non adimatur; et ita Divi Severus et Antoninus reſcripſerunt. Iidem reſcripſerunt, peculio legato non videri id relictum, ut petitionem habeat pecuniæ, quam in rationes dominicas impenderit. Iidem reſcripſerunt, peculium videri legatum, cum rationibus redditis liber eſſe juſſus eſt, et ex eo reliqua inferre.

§ 20. *When the* peculium *of a ſlave is bequeathed, it is certain, that the increaſe or decreaſe of it, in the life of the teſtator, becomes the loſs or gain of the legatary. And, if the* peculium *of a ſlave is left to him together with his liberty, and ſuch ſlave makes an Acquiſition to the* peculium, *ſubſequent to the death of the teſtator, and before the inheritance is entered upon, it is the opinion of* JULIAN, *that whatever is acquired within that period, will paſs to him as the legatary; for ſuch a legacy does not become due, but from the day of the acceptance of the inheritance. But it is the opinion of the ſame* JULIAN, *that, if the* peculium *of a ſlave is bequeathed to a ſtranger, an increaſe, acquired within the period above-mentioned, will not paſs under the legacy, unleſs the acquiſition was made, by means of ſomething appertaining to the* peculium; *for the* peculium *of a ſlave does not belong to him, after he is manumited by teſtament, unleſs it is expreſsly given; altho', if a maſter in his lifetime manumits his ſlave, his* peculium *will paſs to him of courſe, if not excepted: and thus the emperors* SEVERUS *and* ANTONINUS *have decreed by their reſcript. And the ſame emperors have alſo declared, that, when a* peculium *is bequeathed to a ſlave, it does not ſeem to be the intention of the teſtator, that ſuch ſlave ſhould have the power of demanding what he may have expended for the uſe of his maſter. And the ſame princes have farther declared, that a ſlave ſeems to be intituled to his* peculium, *if his liberty is left him, on condition, that he will bring in his accounts, and ſupply any deficiency out of the profits of his* peculium.

De

De rebus corporalibus et incorporalibus.

§ XXI. Tam autem corporales res legari poſſunt, quam incorporales: et ideo, quod defuncto debetur, poteſt alicui legari, ut actiones ſuas hæres legatario præſtet; niſi exegerit vivus teſtator pecuniam: nam hoc caſu legatum extinguitur. Sed et tale legatum valet; *damnas eſto hæres meus domum illius reficere:* vel *illum ære alieno liberare.*

§ 21. *Things incorporeal may be bequeathed as well as things corporeal: and therefore a debt, due to the teſtator, may be left as a legacy, and the heir be obliged to transfer his right of action to the legatary; unleſs the teſtator in his life-time received the money due to him; for in this caſe the legacy would become extinct. A legacy is alſo good, if conceived in the terms following:* — I command my heir to rebuild the houſe of TITIUS: *or* to free him from his debts.

De legato generali.

§ XXII. Si generaliter ſervus, vel res alia, legetur, electio legatarii eſt, niſi aliud teſtator dixerit.

§ 22. *If a teſtator bequeaths a ſlave, or any particular thing generally, the power of election is in the legatary, unleſs the teſtator hath declared otherwiſe.*

De optione legata.

§ XXIII. Optionis legatum, id eſt, ubi teſtator ex ſervis ſuis vel aliis rebus optare legatarium juſſerat, habebat olim in ſe conditionem: et ideo, niſi ipſe legatarius vivus optaſſet, ad hæredem legatum non tranſmittebat. Sed ex conſtitutione noſtra et hoc in meliorem ſtatum reformatum eſt, et data eſt licentia hæredi legatarii optare ſervum, licet vivus legatarius hoc non fecerit. Et, diligentiore tractatu habito, et hoc in noſtra conſtitutione additum eſt, ſive plures legatarii extiterint, quibus optio relicta eſt, et diſſentiant in corpore eligendo; ſive unius legatarii plures hæredes ſint, et inter ſe circa optandum diſſentiant, alio aliud corpus eligere cupiente, ne pereat legatum, (quod plerique prudentum contra benevolentiam introducebant,) fortunam eſſe hujus optionis judicem, et ſorte hoc eſſe dirimendum, ut, ad quem ſors pervenerit, illius ſententia in optione præcellat.

§ 23. *The legacy of an option is made, when a teſtator commands his legatary to chuſe any ſlave, whom he likes, from among his ſlaves, or any one thing, which he beſt approves of, from any certain claſs of things; and ſuch a legacy was formerly preſumed to imply this condition, that, if the legatee in his life-time did not make his election, the legacy could not be tranſmited to his heir. But, by virtue of our conſtitution, this preſumption of law is now taken away, and the heir of the legatary is permited to make his option, altho' the legatary in his life-time hath neglected to do it. And, upon a more diligent inſpection, we have farther added to our conſtitution, that, if there are ſeveral legataries, to whom an option is left, and they differ in their choice, or if there are many heirs of one legatary, who are of divers ſentiments, then* Fortune *muſt be*

the judge: for, leſt the loſs of the legacy ſhould inſue, (which loſs the generality of the antient lawyers, contrary to all benevolence, would have permited,) we have decreed, that ſuch diſſentions between heirs, or legataries, ſhould be decided by lot; ſo that the option of him, to whom the lot falls, ſhall be prefered.

Sed ex conſtitutione.] *vid. Cod.* 6. *t.* 43. *l. ult.*

Quibus legari poteſt.

§ XXIV. Legari autem illis ſolum poteſt, cum quibus teſtamenti factio eſt.

§ 24. *A legacy cannot be left but to thoſe, who have the capacity of taking by teſtament.*

Jus antiquum de incertis perſonis.

§ XXV. Incertis vero perſonis neque legata neque fidei-commiſſa olim relinqui conceſſum erat. Nam ne miles quidem incertæ perſonæ poterat relinquere, ut Divus Hadrianus reſcripſit. Incerta autem perſona videbatur, quam incerta opinione animo ſuo teſtator ſubjiciebat, veluti, ſi quis ita dicat, *quicunque filio meo filiam ſuam in matrimonium dederit, ei hæres meus illum fundum dato.* Illud quoque, quod iis relinquebatur, qui *poſt teſtamentum ſcriptum primi conſules deſignati eſſent*, æque incertæ perſonæ legari videbatur: et denique multæ aliæ hujuſmodi ſpecies ſunt. Libertas quoque incertæ perſonæ non videbatur poſſe dari, quia placebat nominatim ſervos liberari. Sub certa vero demonſtratione, id eſt, ex certis perſonis, incertæ perſonæ recte legabatur: veluti, *ex cognatis meis, qui nunc ſunt, ſi quis filiam meam uxorem duxerit, ei hæres meus illam rem dato.* Incertis autem perſonis legata vel fidei-commiſſa relicta, et per errorem ſoluta, repeti non poſſe, ſacris conſtitutionibus cautum erat.

§ 25. *It was not formerly permited, that either legacies, or gifts in truſt, ſhould be bequeathed to incertain perſons; for even a ſoldier was prohibited to bequeath to incertain perſons; as the emperor* Adrian *hath declared by his reſcript: and an incertain perſon is reputed to be one, whom the teſtator hath figured only in his imagination, without any determinate knowledge of him: as if a teſtator ſhould thus expreſs himſelf:* — whoever ſhall give his daughter in marriage to my ſon, to that perſon let my heir deliver up ſuch a piece of ground. *And, if a teſtator had made a bequeſt* to the firſt conſuls deſigned after his teſtament was written, *this alſo would have been eſteemed a bequeſt to incertain perſons; and of the ſame kind there are divers other examples. Freedom likewiſe could not be confered upon an incertain perſon; for it was neceſſary, that all ſlaves ſhould be nominally infranchiſed: but a legacy might have been given to an incertain perſon under a certain demonſtration; or, in other words, to an incertain perſon, if he was one of a number of perſons certain; as for inſtance, if a teſtator ſhould bequeath in the manner following* — I command TITIUS my heir to give ſuch a particular thing to any one of my preſent collateral relations, who ſhall think proper to take my daughter in marriage.

But,

But, if a legacy or fiduciary gift had been paid to incertain perſons by miſtake, it was provided by the conſtitutions, that ſuch perſons were not compellable to refund.

Sacris conſtitutionibus.] Theſe conſtitutions are not extant.

Jus antiquum de poſthumo alieno.

XXVI. Poſthumo quoque alieno inutiliter antea legabatur. Eſt autem alienus poſthumus, qui natus inter ſuos hæredes teſtatori futurus non eſt: ideoque, ex emancipato filio conceptus nepos, extraneus erat poſthumus avo.

§ 26. *Formerly a legacy could not have been profitably or legally given to a poſthumous ſtranger; and a poſthumous ſtranger is he, who, if he had been born before the death of the teſtator, could not have been numbered among his proper heirs: and of conſequence a poſthumous grandſon, by an emancipated ſon, was a poſthumous ſtranger in regard to his grandfather.*

Jus novum de perſonis incertis et poſthumo alieno.

§ XXVII. Sed nec hujuſmodi ſpecies penitus eſt ſine juſta emendatione relicta, cum in noſtro codice conſtitutio poſita ſit, per quam et huic parti medemur, non ſolum in hæreditatibus, ſed etiam in legatis et fidei-commiſſis: quod evidenter ex ipſius conſtitutionis lectione clareſcit. Tutor autem nec per noſtram conſtitutionem incertus dari debet: quia certo judicio debet quis pro tutela ſuæ poſteritati cavere.

§ 27. *Such was the ſtate of the antient law, which hath not been left without a proper emendation; for we have promulged a conſtitution, by which we have altered the law concerning incertain perſons, not only in reſpect to inheritances, but in regard alſo to legacies and fiduciary bequeſts. But this alteration will evidently appear from a peruſal of the conſtitution itſelf; which nevertheleſs gives no authority to the nomination of an incertain tutor; for it is incumbent upon every parent to take care of his poſterity in this reſpect, by a certain and determinate appointment.*

Conſtitutio poſita.] not extant.

De poſthumo alieno hærede inſtituto.

§ XXVIII. Poſthumus autem alienus hæres inſtitui et ante poterat, et nunc poteſt: niſi in utero ejus ſit, quæ jure noſtro uxor eſſe non poteſt.

§ 28. *A poſthumous ſtranger could formerly have been inſtituted and may now be appointed an heir, unleſs it appears, that he was conceived by a woman, who could not have been legally married to his father.*

Poſthumus autem alienus.] Tho' the antient civil law would not ſuffer a poſthumous ſtranger to be an heir, or a legatary, yet the Prætorian law allowed a poſthumous ſtranger to be an heir in effect, by giving him the poſſeſſion *ſecundum tabulas*, *i. e.* according to the tenor of the teſtament: and this is what is meant by ſaying, *that a poſthumous ſtranger could antiently have been inſtituted*; but a poſthumous ſtranger never had that power or capacity under the *civil law*, till it was given by *Juſtinian*'s conſtitution.

De

De errore in nomine legatarii.

XXIX. Siquidem in nomine, cognomine, prænomine, agnomine, legatarii teſtator erraverit, cum de perſona conſtat, nihilominus valet legatum. Idemque in hæredibus ſervatur; et recte: nomina enim ſignificandorum hominum gratia reperta ſunt: qui ſi alio quolibet modo intelligantur, nihil intereſt.

§ 29. *Altho' a teſtator may happen to have miſtaken the* nomen, cognomen, prænomen, *or* agnomen *of a legatary, yet, if his perſon is certain, the legacy is good. The ſame rule of law is alſo obſerved in regard to heirs, and with great reaſon: for the uſe of names is but to point out perſons; and, if perſons can be denoted by any other method, it will make no difference.*

Siquidem in nomine.] *Chariſius* the grammarian gives the following brief but clear account of the *Roman* names. "Propria nomina in quatuor ſpecies dividuntur, prænomen, nomen, cognomen, agnomen, ut Publius Cornelius Scipio Africanus; prænomen eſt, quod nomini præponitur, ut Publius; nomen, quod familiæ originem declarat, ut Cornelius; cognomen, quod nomini ſubjungitur, ut Scipio; agnomen, quod extrinſecus adjici ſolet, ut Africanus. *vid. Vinn.*"

De falſa demonſtratione.

XXX. Huic proxima eſt illa juris regula, falſa demonſtratione legatum non perimi: veluti, ſi quis ita legaverit, *Stichum ſervum meum vernam do, lego.* Licet enim non verna, ſed emptus ſit, ſi tamen de ſervo conſtat, utile eſt legatum. Et convenienter, ſi ita demonſtraverit, *Stichum ſervum, quem a Seio emi,* ſitque ab alio emptus, utile eſt legatum, ſi de ſervo conſtat.

§ 30. *The rule of law, which comes neareſt to the foregoing, is, that a legacy is not rendered null by a falſe demonſtration: ſuppoſe, for inſtance, that a bequeſt is thus worded:* —— I give and bequeath STICHUS my ſlave, who was born in my family: — *in this caſe, altho'* Stichus *was not born in the family of the teſtator, but bought, yet, if there is a certainty of his perſon, the legacy is valid. And if a teſtator ſhould write as follows* —— I bequeath STICHUS my ſlave, whom I bought of SEIUS — *yet, altho' he was bought of another, the legacy would be good, if there was no doubt as to the identity of the perſon of* STICHUS.

De falſa cauſa adjecta.

XXXI. Longe magis legato falſa cauſa adjecta non nocet: veluti cum quis ita dixerit: *Titio, qui me abſente negotia mea curavit, Stichum do, lego:* vel ita, *Titio, quia patrocinio ejus capitali crimine liberatus ſum, Stichum do, lego.* Licet enim neque negotia teſtatoris unquam geſſerit Titius, neque patrocinio ejus liberatus ſit, legatum tamen valet. Sed, ſi conditionaliter enunciata fuerit cauſa, aliud juris eſt: veluti hoc modo, *Titio, ſi negotia mea curaverit, fundum meum do, lego.*

§ 31. A fortiori *a legacy is not rendered the leſs valid, altho' a falſe reaſon is aſſigned for bequeathing it: as if a teſtator ſhould thus expreſs himſelf:* — I give my ſlave STICHUS to TITIUS, becauſe he took care of my affairs in my abſence: *or*, becauſe I was acquited upon an accuſation of a capital offenſe by his care and protection. *For, altho'* Titius *had never taken care of the affairs of the deceaſed, and altho' the teſtator was never acquited from any charge of a capital crime by means of* Titius, *the legacy will nevertheleſs be good. But if the bequeſt had been declared to be conditional, as for example, if the teſtator had expreſſed himſelf as follows* —— I give to TITIUS ſuch a piece of ground, if it ſhall appear, that he hath taken a proper care of my affairs, *then the law would be different.*

De ſervo hæredis.

§ XXXII. An ſervo hæredis recte legemus, quæritur: et conſtat, pure inutiliter legari, nec quicquam proficere, ſi vivo teſtatore de poteſtate hæredis exierit; quia, quod inutile foret legatum, ſi ſtatim poſt factum teſtamentum deceſſiſſet teſtator, hoc non debet ideo valere, quia diutius teſtator vixerit. Sub conditione vero recte legatur ſervo, ut requiramus, an, quo tempore dies legati cedit, in poteſtate hæredis non ſit.

§ 32. *It hath been a queſtion, whether a teſtator can legally give a legacy to the ſlave of his heir? and it is certain, that a legacy, purely and ſimply given to ſuch a ſlave, can avail him nothing, altho' he ſhould afterwards be freed from the power of the heir in the life-time of the teſtator; for a bequeſt, which would have been null, if the teſtator had expired immediately after he had made it, ought not to become valid, merely becauſe the teſtator happened to enjoy a longer life. But a teſtator may give a conditional legacy to the ſlave of his inſtituted heir, and ſuch legacy will be good, if the ſlave is not under the power of the heir, when the condition is fulfilled.*

Quæritur.] If a teſtator gives a legacy to the ſlave of his heir without annexing any condition, ſuch a legacy is void; for a bequeſt, made to the ſlave, is in effect made to the heir; and it would be highly abſurd in a teſtator to command his heir to pay a legacy to himſelf. And altho' the ſlave of the heir ſhould afterwards ceaſe to be under the power of his maſter in the life-time of the teſtator, either by paſſing to another maſter, or by obtaining his freedom, yet this would give no force to the legacy; for it is laid down as a rule by *Cato*; *quod, ſi teſtamenti facti tempore deceſſit teſtator, inutile foret; id legatum, quandocunque deceſſerit, non valere ff.* 34. *t.* 7. But, when legacies are conditional, this rule is not obſerved; for in ſuch bequeſts nothing is regarded but the event of the condition.

De domino hæredis.

§ XXXIII. Ex diverſo hærede inſtituto ſervo, quin domino recte etiam ſine conditione legetur, non dubitatur. Nam, etſi ſtatim poſt factum teſtamentum deceſſerit teſtator, non tamen apud eum, qui hæres ſit, dies legati cedere intelligitur; cum hæreditas a legato ſeparata ſit, et poſſit per cum ſervum alius hæres effici, ſi prius, quam juſſu domini adeat, in alterius poteſtatem tranſlatus ſit: vel manumiſſus ipſe hæres efficitur: quibus caſibus utile eſt legatum. Quod ſi in eadem cauſa permanſerit, et juſſu legatarii adierit, evaneſcit legatum.

§ 33. *On*

§ 33. *On the contrary it is not doubted, but that a ſlave may be appointed an heir, and that his then maſter may take even a ſimple legacy by the ſame teſtament: for, altho' the teſtator ſhould die inſtantly after making his teſtament, yet the legacy is not underſtood to become immediately due from the ſlave, who is the heir; for the inheritance is here ſeparate from the legacy, and another may become heir by means of the ſlave, if he ſhould be transfered to a new maſter, before he hath entered upon the inheritance at the command of his maſter, who is the legatary; or the ſlave himſelf may become heir in his own right by manumiſſion; and in theſe caſes the legacy would be good. But, if the ſlave ſhould remain in the ſame ſtate, and enter upon the inheritance by order of his maſter, who is the legatary, the legacy would, as ſuch, become extinct.*

De modo et ratione legandi. De ordine ſcripturæ.

§. XXXIV. Ante hæredis inſtitutionem inutiliter antea legabatur; ſcilicet, quia teſtamenta vim ex inſtitutione hæredis accipiunt, et ob id veluti caput atque fundamentum intelligitur totius teſtamenti hæredis inſtitutio. Pari ratione nec libertas ante hæredis inſtitutionem dari poterat. Sed, quia incivile eſſe putavimus, ſcripturæ ordinem quidem ſequi, (quod et ipſi antiquitati vituperandum fuerat viſum,) ſperni autem teſtatoris voluntatem, per noſtram conſtitutionem et hoc vitium emendavimus, ut liceat et ante hæredis inſtitutionem et inter medias hæredis inſtitutiones legatum relinquere, et multo magis libertatem, cujus uſus favorabilior eſt.

§ 34. *A legacy could not formerly have been given with effect, till the heir was inſtituted; becauſe a teſtament receives it's whole force and efficacy from the inſtitution of the heir, which is underſtood to be the baſis and foundation of it: and by a parity of reaſoning it was alſo neceſſary, that the inſtitution of an heir ſhould always precede the grant of freedom in a teſtament. But we have thought it to be wrong and abſurd, that a ſtrict regard ſhould be paid to the mere order of writing, in direct oppoſition to the expreſs intention of a teſtator: and the antients themſelves ſeem to have been of this opinion in general: we have therefore, by virtue of our conſtitution, amended the law in this point; ſo that a legacy may now be given; and,* a fortiori, *a grant of liberty, which is always favored, may be bequeathed, before the inſtitution of an heir, where there is but one; and, either before or between the inſtitutions of heirs, where there are ſeveral.*

De legato poſt mortem hæredis, vel legatarii.

§ XXXV. Poſt mortem quoque hæredis aut legatarii ſimili modo inutiliter legabatur: veluti, ſi quis ita dicat, *cum hæres meus mortuus fuerit, do, lego:* item *pridie quam hæres aut legatarius morietur.* Sed ſimili modo et hoc correximus, firmitatem hujuſmodi legatis ad fidei-commiſſorum ſimilitudinem præſtantes; ne in hoc caſu deterior cauſa legatorum, quam fidei-commiſſorum, inveniatur.

§ 35. *A bequeſt, made to take place after the death of an heir or legatary, was alſo ineffectual: for, if a teſtator had written,* when my heir is dead I give and bequeath

bequeath an hundred AUREI to Titius,—*or even thus*, I give and bequeath an hundred AUREI to be paid to Titius, on the day preceding the day of the death of my heir, —*or*, on the day preceding the day of the death of my legatary,—— *the legacies in any of theſe caſes would have been void. But we have corrected the antient rule of law in this reſpect, by giving all ſuch legacies the ſame validity, which is given to gifts in truſt; leſt truſts ſhould be found to be more favored, than legacies.*

Correximus.] *vid. Cod.* 8. *t.* 38. l. 11.

Si pœnæ nomine relinquatur, adimatur, vel transferatur.

§ XXXVI. Pœnæ quoque nomine inutiliter antea legabatur, et adimebatur, vel transferebatur. Pœnæ autem nomine legari videtur, quod coercendi hæredis cauſa relinquitur, quo magis aliquid faciat, aut non faciat: veluti ſi quis ita ſcripſerit; *hæres meus ſi filiam ſuam in matrimonium Titio collocaverit:* vel ex diverſo, *ſi non collocaverit, dato decem aureos Seio:* aut ſi ita ſcripſerit; *hæres meus ſi ſervum Stichum alienaverit:* vel ex diverſo, *ſi non alienaverit, Titio decem aureos dato.* Et in tantum hæc regula obſervabatur, ut quam plurimis principalibus conſtitutionibus ſignificaretur, nec principem agnoſcere, quod ei pœnæ nomine legatum ſit: nec ex militis quidem teſtamento talia legata valebant; quamvis aliæ militum voluntates in ordinandis teſtamentis valde obſervabantur: quinetiam nec libertates pœnæ nomine dari poſſe placebat: eo amplius, nec hæredem pœnæ nomine adjici poſſe, Sabinus exiſtimabat: veluti ſi quis ita dicat, *Titius hæres eſto: ſi Titius filiam ſuam in matrimonium Seio collocaverit, Seius quoque hæres eſto.* Nihil enim intererat, qua ratione Titius coerceretur, utrum legati datione, an cohæredis adjectione. Sed hujuſmodi ſcrupuloſitas nobis non placuit: et generaliter ea, quæ relinquuntur, licet pœnæ nomine fuerint relicta et adempta, vel in alium tranſlata, nihil diſtare a cæteris legatis conſtituimus, vel in dando, vel in adimendo, vel in transferendo: exceptis videlicet iis, quæ impoſſibilia ſunt, vel legibus interdicta, aut alias probroſa. Hujuſmodi enim teſtamentorum diſpoſitiones valere ſecta meorum temporum non patitur.

§ 36. *Alſo formerly, if a teſtator had given, revoked, or transfered a legacy* pœnæ nomine, *he would have acted ineffectually: and a legacy is reputed to be bequeathed* pœnæ nomine, [i. e. *as a puniſhment or penalty,*] *when an heir is put under the neceſſity of doing or not doing ſomething: as for inſtance, if a teſtator had thus writen*; —— if my heir gives his daughter in marriage to TITIUS; *or*, if he does not give her in marriage to TITIUS, let him pay ten AUREI to SEIUS: *or thus:* —— if my heir ſhall alien my ſlave STICHUS; *or, on the contrary*, if my heir ſhall not alien my ſlave STICHUS, let him pay ten AUREI to TITIUS. *And this rule was ſo far obſerved, that it was expreſsly ordained by many conſtitutions, that even the emperor could not receive a legacy, which was bequeathed* pœnæ nomine; *nor could a penal legacy be valid, even when it had been bequeathed by the teſtament of a ſoldier; altho', in every other reſpect, the intention of a teſtator in a military teſtament was always ſcrupulouſly adhered to. And even freedom could not*

be bequeathed, nor, in the opinion of SABINUS, *could an heir be added in a teſtament*, ſub pœnæ nomine: *for, if a teſtator had ſaid*, let TITIUS be my heir, but if he gives his daughter in marriage to SEIUS, let SEIUS alſo be my heir, *the appointment of* Seius *would have been void; for the manner, in which an heir was laid under coertion, whether it was by the gift of a legacy, or by the addition of another heir, worked no alteration in the general rule of law. But this ſcrupuloſity hath been by no means agreeable to us, and we have therefore ordained, that in general the doctrine of the law in regard to any thing left, revoked, or transfered, in puniſhment of an heir, ſhould not differ from the rules of law obſerved in relation to other legacies, when the performance of the condition of obtaining them is neither impoſſible, prohibited by law, nor contrary to good manners: for the morality, religion, and juſtice, of the preſent times will not ſuffer ſuch teſtamentary diſpoſitions to take place.*

Conſtituimus.] *vid. Cod.* 6. *t.* 41.

TITULUS VIGESIMUS-PRIMUS.

De ademptione legatorum et tranſlatione.

D.xxxiv. T.4.

De ademptione.

ADemptio legatorum, ſive eodem teſtamento adimantur, ſive codicillis, firma eſt. Sed et, ſive contrariis verbis fiat ademptio, veluti ſi quod ita quis legaverit, *do*, *lego*, ita adimatur, *non do*, *non lego:* ſive non contrariis, ſed aliis quibuſcumque verbis.

A revocation of a legacy is valid, altho' it is inſerted in the ſame teſtament or codicil, in which the legacy was given. And it is immaterial, whether the revocation is made in words contrary to the bequeſt; as when a teſtator gives a legacy in theſe terms, I give and bequeath to TITIUS, —— *and revokes it by adding,* — I do not give and bequeath to TITIUS: *or whether the revocation is made by any other form of words.*

De tranſlatione.

§ I. Transferri quoque legatum ab alio ad alium poteſt; veluti ſi quis ita dixerit, *hominem Stichum, quem Titio legavi, Seio do, lego:* ſive in eodem teſtamento, ſive codicillis, id fecerit: quo caſu ſimul et Titio adimi videtur et Seio dari.

§ I. *A legacy may alſo be transfered from one perſon to another; as thus* —— I give to SEIUS my ſlave STICHUS, whom I have bequeathed to TITIUS. *This may be done in the ſame teſtament or codicil, in which the legacy was firſt given; and thus a legacy may be taken tacitly and by implication from* TITIUS *and transfered to* SEIUS.

TITULUS

TITULUS VIGESIMUS-SECUNDUS.

De lege Falcidia.

D. XXXV. T. 2. C. VI. T. 50. Nov. 1.

Ratio et ſumma hujus legis.

SUPEREST, ut de lege Falcidia diſpiciamus, qua modus noviſſime legatis impoſitus eſt. Cum enim olim lege duodecim tabularum libera erat legandi poteſtas, ut liceret vel totum patrimonium legatis erogare: quippe, cum ea lege ita cautum eſſet, *uti quiſque legaſſit ſuæ rei, ita jus eſto*, viſum eſt hanc legandi licentiam coarctare; idque ipſorum teſtatorum gratia proviſum eſt, ob id, quod plerumque inteſtati moriebantur, recuſantibus ſcriptis hæredibus pro nullo aut minimo lucro hæreditates adire. Et, cum ſuper hoc tam lex Furia quam lex Voconia latæ ſunt, quarum neutra ſufficiens ad rei conſummationem videbatur, noviſſime lata eſt lex Falcidia, qua cavetur, ne plus legare liceat, quam dodrantem totorum bonorum: id eſt, ut, ſive unus hæres inſtitutus ſit, ſive plures, apud eum eoſve pars quarta remaneat.

It remains to ſpeak of the law Falcidia, *by which legacies have received their lateſt regulation. By the law of the* 12 *tables*, — uti quiſque legaſſit ſuæ rei, ita jus eſto, —— *a teſtator was permited to diſpoſe of his whole patrimony in legacies: but it was thought proper to reſtrain this licence even for the benefit of teſtators themſelves, becauſe they frequently died inteſtate, their heirs refuſing to enter upon an inheritance, from which they could receive no profit, or but very little. And this occaſioned the introduction firſt of the law* Furia, *and afterwards of the law* Voconia: *but, when neither of theſe was found adequate to the purpoſe intended, the* Falcidian *law was at length enacted; which prohibits a teſtator to give more in legacies, than three fourths of all his effects; ſo that, whether there is one or more heirs, there muſt now remain to him, or them, an intire fourth part of the whole.*

Ut de lege Falcidia.] This law was a *plebiſcitum*, made by *Pub. Falcidius*, tribune of the people, in the reign of *Auguſtus*, *anno U. C.* 745.

Tam lex Furia, quam lex Voconia.] The law *Furia* prohibited any teſtator to give more in legacies than one thouſand *aſſes*; but notwithſtanding this law a teſtator, who was worth only one thouſand *aſſes*, might have bequeathed his whole eſtate, and left nothing for his heir. The law *Voconia* [made by *Voconius*, tribune of the people *ann. U. C.* 524.] abrogated the law *Furia*, and ordained, that no one legatary ſhould be intituled to more by virtue of his legacy, than would afterwards remain to the heir out of the effects of the teſtator; but this law alſo was in time found rather to multiply legataries, than benefit heirs, and was therefore abrogated by the law *Falcidia*.

De pluribus hæredibus.

§ I. Et, cum quæſitum eſſet, duobus hæredibus inſtitutis (veluti Titio et Seio) ſi Titii pars aut tota exhauſta ſit legatis, quæ nominatim ab eo data ſunt, aut ſupra modum onerata, a Seio vero aut nulla relicta ſint legata, aut quæ partem ejus duntaxat in partem diminuant, an, quia is quartam partem totius hæreditatis, aut amplius habet, Titio nihil ex legatis, quæ ab eo relicta ſunt, retinere liceat, ut quartam partem ſuæ partis ſalvam habeat? placuit poſſe retinere. Etenim in ſingulis hæredibus ratio legis Falcidiæ ponenda eſt.

§ 1. *When two heirs are inſtituted, for example,* TITIUS *and* SEIUS, *and* Titius's *moity of the inheritance is wholly exhauſted, or overcharged by legacies, which he is expreſsly ordered to pay; and on the other ſide* Seius's *moity is either not incumbered, or is charged with legacies, which amount only to the half of his ſhare; it hath in this caſe been a queſtion, whether, altho'* Seius *hath a fourth or more of the whole inheritance, it may not nevertheleſs be lawful for* TITIUS *to make a ſtoppage out of the legacies, with which he is charged, ſo as to retain a fourth part of his own moity? and it hath been determined, that* Titius *may make ſuch ſtoppage; for the reaſon and equity of the law* Falcidia *extends to each heir in particular.*

Quo tempore ſpectatur quantitas patrimonii, ad quam ratio legis Falcidiæ redigitur.

§ II. Quantitas autem patrimonii, ad quam ratio legis Falcidiæ redigitur, mortis tempore ſpectatur. Itaque, (verbi gratia) ſi is, qui centum aureorum patrimonium in bonis habeat, centum aureos legaverit, nihil legatariis prodeſt, ſi ante aditam hæreditatem per ſervos hæreditarios, aut ex partu ancillarum hæreditariarum, aut ex fœtu pecorum, tantum acceſſerit hæreditati, ut, centum aureis legatorum nomine erogatis, hæres quartam partem hæreditatis habiturus ſit: ſed neceſſe eſt, ut nihilominus quarta pars legatis detrahatur. Ex diverſo, ſi ſeptuaginta quinque legaverit, et ante aditam hæreditatem in tantum decreverint bona, (incendiis forte, aut naufragiis, aut morte ſervorum) ut non amplius quam̃ ſeptuaginta quinque aureorum ſubſtantia vel etiam minus relinquatur, ſolida legata debentur. Nec ea res damnoſa eſt hæredi, cui liberum eſt non adire hæreditatem: quæ res efficit, ut ſit neceſſe legatariis, ne deſtituto teſtamento nihil conſequantur, cum hærede in portione paciſci.

§ 2. *But the law* Falcidia *hath regard only to the quantity of the eſtate at the time of the death of the teſtator; and therefore, if he, who is worth but an hundred* aurei *at his deceaſe, bequeaths them all in legacies, the legatees muſt ſuffer a defalcation; for they will receive no manner of advantage, altho' the inheritance, after the death of the teſtator and before it is entered upon, ſhould ſo increaſe by the acquiſitions of ſlaves, the children of female ſlaves, or the product of cattle, that, after a full payment of the* 100 aurei *in legacies, an intire fourth of the whole eſtate might*

remain

remain to the heir; for, notwithſtanding the increaſe of the teſtator's eſtate, ſubſequent to his death, a fourth part of the hundred aurei *would ſtill be due to the heir, and the legacies would remain ſubject to a defalcation upon that account. But, on the contrary, if a teſtator hath bequeathed* 75 aurei *in legacies, and was worth an hundred* aurei *at his death, then altho' it ſhould happen, that, before the enterance of the heir, the eſtate ſhould ſo decreaſe by fire, ſhipwreck, or the loſs of ſlaves, that the whole value of it ſhould not be more than* 75 aurei, *and perhaps leſs, yet the legacies would ſtill be due without defalcation: nor is this law prejudicial to an heir, who is always at his election either to refuſe or accept an inheritance; but it obliges legataries to come to an agreement with him to take a part, leſt they ſhould loſe the whole of their legacies by his deſertion of the teſtament.*

Quæ detrahuntur ante Falcidiam.

§ III. Cum autem ratio legis Falcidiæ ponitur, ante deducitur æs alienum, item funeris impenſa, et pretia ſervorum manumiſſorum: tunc demum in reliquo ita ratio habetur, ut ex eo quarta pars apud hæredem remaneat, tres vero partes inter legatarios diſtribuantur, pro rata ſcilicet portione ejus, quod cuique eorum legatum fuerit. Itaque, ſi fingamus, quadringentos aureos legatos eſſe, et patrimonii quantitatem, ex qua legata erogari oportet, quadringentorum eſſe, quarta pars ſingulis legatariis debet detrahi. Quod ſi trecentos quinquaginta legatos fingamus, octava debet detrahi. Quod ſi quingentos legaverit, initio quinta, deinde quarta, detrahi debet. Ante enim detrahendum eſt, quod extra bonorum quantitatem eſt, deinde quod ex bonis apud hæredem remanere oportet.

§ 3. *The* Falcidian *portion is not taken by the heir, till the debts, funeral expenſes, and the price of the manumiſſion of ſlaves, have all been previouſly deducted; and then the fourth part of the remainder appertains to the heir, and the other three parts are divided among the legataries in a ratable proportion: for example, let it be ſuppoſed, that* 400 aurei *have been bequeathed in legacies, and that the eſtate, from which theſe legacies are intended to iſſue, is worth but exactly that ſum; it follows, that a fourth muſt be ſubtracted from the legacy of each legatary; but, if the teſtator gave in legacies no more than* 350 aurei, *and there remained after debts paid* 400, *then an eighth only ought to be deducted from each legacy. And, if a teſtator hath bequeathed* 500 aurei *in legacies, and there remain clear in the hands of the heir but* 400, *then a fifth muſt firſt be deducted from every legacy, and afterwards a fourth: for that, which exceeds the real value of the goods of the deceaſed, muſt firſt be ſubtracted, and then follows the deduction of what is due to the heir.*

TITULUS

TITULUS VIGESIMUS-TERTIUS.

De fidei-commiſſariis hæreditatibus.

D. xxxvi. T. 1. C. vi. T. 42. et 49. Nov. 39. 108.

Continuatio.

NUNC tranſeamus ad fidei-commiſſa. Sed prius eſt, ut de hæreditatibus fidei-commiſſariis videamus.

Let us now proceed to truſts; in treating of which we will firſt ſpeak of fiduciary inheritances.

Origo fidei-commiſſorum.

§ I. Sciendum itaque eſt, omnia fidei-commiſſa primis temporibus infirma fuiſſe; quia nemo invitus cogebatur præſtare id, de quo rogatus erat. Quibus enim non poterant hæreditatem vel legata relinquere, ſi relinquebant, fidei committebant eorum, qui capere ex teſtamento poterant. Et ideo fidei-commiſſa appellata ſunt, quia nullo vinculo juris ſed tantum pudore eorum, qui rogabantur, continebantur. Poſtea Divus Auguſtus primus ſemel iterumque gratia perſonarum motus, vel quia per ipſius ſalutem rogatus quis diceretur, aut ob inſignem quorundam perfidiam, juſſit conſulibus auctoritatem ſuam interponere. Quod, quia juſtum videbatur et populare erat, paulatim converſum eſt in aſſiduam juriſdictionem; tantuſque eorum favor factus eſt, ut paulatim etiam prætor proprius crearetur, qui de fidei-commiſſis jus diceret, quem fidei-commiſſarium appellabant.

§ 1. *It muſt be obſerved, that in the firſt times all truſts were weak and precarious; for no man could be compelled to the performance of what he was only* requeſted *to perform. And yet, when teſtators were deſirous of giving an inheritance or legacy to perſons, to whom they could directly bequeath neither, they then commited the inheritance or legacy in truſt to thoſe, who were capable of taking, and ſuch commitments were called fiduciary, becauſe the performance of the truſt could not be inforced by the law, but depended ſolely upon the honor of the truſtee. But the emperor* Auguſtus, *having been frequently moved with compaſſion on account of particular perſons, and deteſting the perjury and perfidiouſneſs of truſtees in general, commanded the conſuls to interpoſe their authority; and this, being a juſt and popular command, gave them by degrees a continued juriſdiction; and in proceſs of time truſts became ſo common, and were ſo highly favored, that a prætor was purpoſely appointed to give judgment in theſe caſes, and was therefore called the commiſſary of truſts.*

De

De fidei-commiſſo hæredis ſcripti.

§ II. In primis igitur ſciendum eſt, opus eſſe, ut aliquis recto jure teſtamento hæres inſtituatur, ejuſque fidei committatur, ut eam hæreditatem alii reſtituat: alioqui inutile eſt teſtamentum, in quo nemo hæres inſtituitur. Cum igitur aliquis ſcripſerit, *Lucius Titius hæres eſto*, poteſt adjicere, *rogo te, Luci Titi, ut, cum primum poteris hæreditatem meam adire, eam Caio Seio reddas, reſtituas.* Poteſt autem quiſque et de parte reſtituenda hæredem rogare: et liberum eſt vel pure, vel ſub conditione, relinquere fidei-commiſſum, vel ex certo die.

§ 2. *We muſt here obſerve, that there is an abſolute neceſſity of appointing an heir in direct terms to every teſtament; but he then may be requeſted to reſtore the inheritance to any other perſon; for without an heir a teſtament is ineffectual. And therefore, when a teſtator ſays* — let LUCIUS TITIUS be my heir — *he may add* — and I requeſt you, LUCIUS TITIUS, that, as ſoon as you enter upon my inheritance, you would reſtore it to CAIUS SEIUS. *But a teſtator is at liberty to requeſt his heir to reſtore a part of the inheritance only, and may make him a truſtee upon condition, or from a day certain.*

Hæres inſtituatur.] The ſubſtantial and eſſential part of every teſtament is the appointment of an executor; for in *England*, if a man bequeaths ever ſo many legacies and appoints no executor, ſuch a diſpoſition may be called a codicil or a will, but not a teſtament, and therefore he, who made ſuch a diſpoſition, ſhall be deemed to have died without a teſtament, and the adminiſtration of his goods, with the will annexed, ſhall be commited to his widow or next of kin, as in the caſe of an inteſtate. *Swinb. part* 4. *ſect.* 2.

Effectus reſtitutionis hæreditatis.

§ III. Reſtituta autem hæreditate, is quidem, qui reſtituit, nihilominus hæres permanet: is vero, qui recipit hæreditatem, aliquando hæredis aliquando legatarii loco habetur.

§ 3. *After an heir hath reſtored an inheritance in obedience to the truſt repoſed in him, he nevertheleſs continues heir. But he, who hath received the inheritance from ſuch fiduciary heir, is ſometimes reputed to be in the place of the heir, and ſometimes in the place of a legatary.*

De ſenatus-conſulto Trebelliano.

§ IV. Et Neronis quidem temporibus, Trebellio Maximo et Annæo Seneca coſſ. ſenatus-conſultum factum eſt, quo cautum eſt, ut, ſi hæreditas ex fidei-commiſſi cauſa reſtituta ſit, omnes actiones, quæ jure civili hæredi et in hæredem competerent, ei et in eum darentur, cui ex fidei-commiſſo reſtituta eſſet hæreditas. Poſt quod ſenatus-conſultum prætor utiles actiones ei et in eum, qui recepit hæreditatem, quaſi hæredi et in hæredem, dare cœpit.

§ 4. *In the reign of* NERO *the emperor, when* TREBELLIUS MAXIMUS *and* ANNÆUS SENECA *were conſuls, it was provided by a decree of the ſenate, that, if an inheritance was reſtored by reaſon of a truſt, all actions, which by the civil law might be brought by or againſt the heir, ſhould be given to and againſt him, to whom the*

the inheritance was reſtored. — And, after this decree, the prætor began to give equitable and beneficial actions to and againſt the receiver of an inheritance, as if he was the heir.

Utiles actiones.] See the 4th book of the *inſtitutions*, title 6, law 16.

De ſenatus-conſulto Pegaſiano.

§ V. Sed, quia hæredes ſcripti, cum aut totam hæreditatem, aut pene totam, plerumque reſtituere rogabantur, adire hæreditatem ob nullum vel minimum lucrum recuſabant, atque ob id extinguebantur fidei-commiſſa, poſtea Veſpaſiani Auguſti temporibus, Pegaſo et Puſione conſulibus, ſenatus cenſuit, ut ei, qui rogatus eſſet hæreditatem reſtituere, perinde liceret quartam partem retinere, atque ex lege Falcidia ex legatis retinere conceditur. Ex ſingulis quoque rebus, quæ per fidei-commiſſum relinquuntur, eadem retentio permiſſa eſt. Poſt quod ſenatus-conſūltum ipſe hæres onera hæreditaria ſuſtinebat: ille autem, qui ex fidei-commiſſo recipiebat partem hæreditatis, legatarii partiarii loco erat, id eſt, ejus legatarii, cui pars bonorum legabatur: quæ ſpecies legati *partitio* vocabatur, quia cum hærede legatarius partiebatur hæreditatem. Unde, quæ ſolebant ſtipulationes inter hæredem et partiarium legatarium interponi, eædem interponebantur inter eum, qui ex fidei-commiſſo recepit hæreditatem et hæredem, id eſt, ut lucrum et damnum hæreditarium pro rata parte inter eos commune eſſet.

§ 5. *But, when writen heirs were requeſted to reſtore the whole, or almoſt the whole, of an inheritance, they often refuſed to accept it, ſince they could receive but little or no emolument; and thus it happened, that truſts were frequently extinguiſhed. But afterwards in the conſulate of* Pegaſus *and* Pugio, *in the reign of the emperor* Veſpaſian, *the ſenate ordained by their decree, that an heir, who was requeſted to reſtore an inheritance, might retain a fourth, as in the caſe of legacies by the* Falcidian *law. And an heir is alſo allowed to make the ſame deduction from particular things, which are left to him in truſt for the benefit of another. For ſome time after this decree, the heir alone bore the burden of the inheritance,* [i. e. *all the charges and demands incident to it;*] *but afterwards, whoever had received a ſhare or part of an inheritance, by being benefited under a truſt, was regarded as having a partial legacy; and this ſpecies of legacy was called* partition, *becauſe the legatary took a part of the inheritance together with the heir; and hence it aroſe, that the ſame ſtipulations, which were formerly uſed between the heir and the legatary in part, were alſo interpoſed between the perſon benefited under the truſt and the heir or truſtee, to the intent, that the profit and loſs might be in common between them in due proportion.*

Poſt quod ſenatus-conſultum ipſe hæres.] The beſt way to explain this ſection will be to tranſcribe a paſſage from the paraphraſe of *Theophilus*, as it is tranſlated by *Gul. Otto Reitz*; to whom the literary world is much obliged, for his late moſt complete edition of *Theophilus* in *Greek* and *Latin*, to which is added a great variety of notes by the editor and others. This edition conſiſts of two volumes in *4to*, and was publiſhed at the *Hague* in the year 1751.

" Poſt hoc autem hæres ſolus ſubjacebat one-
" ribus hæreditatis, non vero fidei-commiſſarius:
" ſed denique placuit, fidei-commiſſarium vi-
" cem obtinere legatarii partiarii, id eſt, partem
" dimidiam accipientis. Quondam enim quin-
" tum genus legati erat, dicebaturque *partitio*,
" et relinquebatur hoc modo: *Titius mihi hæres*
" *eſto, et cum Seio hæreditatem dividito in dimidia*
" *portione.* Porro igitur hujuſmodi inter eos
" ſtipulationes fiebant. Hæres legatarium ſic

" inter-

" rogabat; — *ſpondes, legatarie, ſi ego conventus* " *commiſſarie, ſi quadraginta aureos poſcar a*
" *viginti aureos ſolvero, eorum mihi ſemiſſem dare?* " *creditore hæreditario, dare mihi triginta?* et
" et dicebat, *ſpondeo.* Rurſuſque legatarius hæ- " hæres interrogabatur a fidei-commiſſario;
" redem ſic interrogabat; — *ſpondes, ſi ab hære-* " *ſpondes, hæres, ſi a debitore hæreditario qua-*
" *ditario debitore viginti aureos acceperis, ſemiſſem* " *draginta aureos acceperis, triginta mihi dare?*
" *mihi dare, i. e. decem?* et dicebat, *ſpondeo:* " et dicebat, *ſpondeo.* Atque hoc modo fidei-
" atque hæc ſtipulatio vocabatur PARTIS ET " commiſſarius univerſalis vicem obtinebat le-
" PRO PARTE. Ad exemplum igitur legatarii " gatarii: oportebatque commune eſſe pro rata,
" partiarii ſtipulatio procedebat hæredem inter " fidei-commiſſarium inter et hæredem, lucrum
" et fidei-commiſſarium: et interrogabat hæres " et damnum." *Theoph. h. t.*
" fidei-commiſſarium ſic; —— *ſpondes, fidei-*

Quibus caſibus locus eſt ſenatus-conſulto Trebelliano vel Pegaſiano.

§ VI. Ergo, ſiquidem non plus quam dodrantem hæreditatis ſcriptus hæres rogatus ſit reſtituere, tum ex Trebelliano ſenatus-conſulto reſtituebatur hæreditas, et in utrumque actiones hæreditariæ pro parte rata dabantur: in hæredem quidem jure civili: in eum vero, qui recipiebat hæreditatem ex ſenatus-conſulto Trebelliano, tanquam in hæredem. At, ſi plus quam dodrantem, vel etiam totam hæreditatem, reſtituere rogatus eſſet, locus erat Pegaſiano ſenatus-conſulto: et hæres, qui ſemel adierat hæreditatem, (ſi modo ſua voluntate adierat,) ſive retinuerat quartam partem, ſive retinere noluerat, ipſe univerſa onera ſuſtinebat. Sed, quarta quidem retenta, quaſi *partis* et *pro parte* ſtipulationes interponebantur, tanquam inter partiarium legatarium et hæredem: ſi vero totam hæreditatem reſtitueret, emptæ et venditæ hæreditatis ſtipulationes interponebantur. Sed, ſi recuſabat ſcriptus hæres adire hæreditatem, ob id, quod diceret, eam ſibi ſuſpectam eſſe, quaſi damnoſam, cavebatur Pegaſiano ſenatus-conſulto, ut; deſiderante eo, cui reſtituere rogatus eſſet, juſſu prætoris adiret, et reſtitueret hæreditatem; perindeque ei et in eum, qui reciperet hæreditatem, actiones darentur, ac juris eſt ex Trebelliano ſenatus-conſulto: quo caſu nullis ſtipulationibus eſt opus: quia ſimul et huic, qui reſtituit, ſecuritas datur, et actiones hæreditariæ ei et in eum transferuntur, qui recipit hæreditatem; utroque ſenatus-conſulto in hac ſpecie concurrente.

§ 6. *And therefore, if a writen heir, or heir in truſt, had not been requeſted to ſurrender more than three fourths of the inheritance, he was obliged to reſtore ſo much of it, by virtue of the* Trebellian ſenatus-conſultum; *and all actions, whether in favor of, or againſt, the inheritance, were brought, or ſuſtained, by the heir and* fidei-commiſſary, *according to their reſpective ſhares; and this obtains, in regard to the heir, by virtue of the civil law: and, in regard to the* fidei-commiſſary, *by virtue of the* Trebellian *decree. But, if the writen heir was requeſted by the teſtater to reſtore the whole inheritance, or more than three fourths, then the* Pegaſian ſenatus-conſultum *took place; for, if he had once taken upon himſelf the heirſhip voluntarily, he was obliged to ſuſtain all charges; and this, whether he did, or did not, retain the fourth, to which he was intituled. But, when an heir retained a fourth part, the ſtipulations, called* partis et pro parte, *were entered into, as between a legatary in part and an heir: and, when the heir did not retain a fourth, then the ſtipulations, called*

called emptæ et venditæ hæreditatis, *were interpoſed. But, if the writen heir, or heir in truſt, refuſed to accept the inheritance on ſuſpicion, that there would not be aſſets, and that the acceptance would be detrimental to him, it was provided by the* Pegaſian *decree, that the prætor, at the inſtance of the* fidei-commiſſary *might compel ſuch heir to take upon himſelf the inheritance, and then reſtore it; and that afterwards all actions ſhould be brought by or againſt the* fidei-commiſſary *only; as it is ordained by the* Trebellian *decree. And in this caſe ſtipulations are not neceſſary; for the heir, who reſtores the inheritance, is made effectually ſecure, and all hereditary actions are transfered to and againſt him, by whom the inheritance is received; there being, in this inſtance, a concurrence of both decrees, the* Pegaſian *and the* Trebellian.

Pegaſiani in Trebellianum transfuſio.

§ VII. Sed, quia ſtipulationes ex ſenatus-conſulto Pegaſiano deſcendentes et ipſi antiquitati diſplicuerunt, et quibuſdam caſibus captioſas eas homo excelſi ingenii Papinianus appellat, et nobis in legibus magis ſimplicitas, quam difficultas, placet, ideo omnibus nobis ſuggeſtis tam ſimilitudinibus, quam differentiis utriuſque ſenatus-conſulti, placuit, exploſo ſenatus-conſulto Pegaſiano, quod poſtea ſupervenit, omnem auctoritatem Trebelliano ſenatus-conſulto præſtare, ut ex eo fidei-commiſſariæ hæreditates reſtituantur: ſive habeat hæres ex voluntate teſtatoris quartam, ſive plus, ſive minus, ſive nihil penitus: ut tunc, quando vel nihil, vel minus quarta, apud eum remanet, liceat ei vel quartam, vel quod ei deeſt, ex noſtra auctoritate retinere, vel repetere ſolutum, quaſi ex Trebelliano ſenatus-conſulto pro rata portione actionibus tam in hæredem, quam in fidei-commiſſarium, competentibus. Si vero totam hæreditatem ſponte reſtituerit, omnes hæreditariæ actiones fidei-commiſſario, et adverſus eum, competant. Sed etiam id, quod præcipuum Pegaſiani ſenatus-conſulti fuerat, ut, quando recuſaret hæres ſcriptus ſibi datam hæreditatem adire, neceſſitas ei imponeretur totam hæreditatem volenti fidei-commiſſario reſtituere, et omnes ad eum, et contra eum, transferre actiones: et hoc tranſpoſuimus ad ſenatus-conſultum Trebellianum, ut ex hoc ſolo neceſſitas hæredi imponatur, ſi, ipſo nolente adire, fidei-commiſſarius deſideret reſtitui ſibi hæreditatem, nullo nec damno nec commodo apud hæredem remanente.

§ 7. *But, as the ſtipulations, which took their riſe from the* Pegaſian *decree, were diſpleaſing even to the antients themſelves, inſomuch that* Papinian, *a man of a true ſublime genius, does not ſcruple to call them captious in ſome caſes, and, as ſimplicity is far more agreeable to us in all matters of law, than unneceſſary difficulties, it hath therefore pleaſed us, upon comparing the agreement and diſagreement of each decree, to abrogate the* Pegaſian, *which was ſubſequent to the* Trebellian, *and to transfer a greater authority to the* Trebellian *decree, by which all* fidei-commiſſary *inheritances ſhall be reſtored for the future, whether the teſtator hath given by his will a fourth part of his eſtate to his writen heir, or more or leſs than a fourth, or even nothing; ſo that, when either nothing is given to the heir, or leſs than a fourth part, he may be permited to retain a fourth, or as much as will complete the deficiency, by*

virtue of our authority, or even to demand a repayment of what he hath paid in his own wrong, all actions being divided between the heir and the fidei-commiſſary *in a juſt proportion according to the* Trebellian *decree. But, if the heir ſpontaneouſly reſtores the whole inheritance, all actions muſt be brought either by or againſt the* fidei-commiſſary *And, whereas it was the principal effect of the power of the* Pegaſian *decree, that, when a writen heir had refuſed to accept an inheritance, he might be conſtrained to take it, and reſtore it, at the inſtance of the* fidei-commiſſary, *to whom, and againſt whom, all actions paſſed, we have transfered that power to the* Trebellian *decree; ſo that this is now the only law, by which a fiduciary heir can be compelled to enter upon the inheritance, when the* fidei-commiſſary *is deſirous, that it ſhould be reſtored; and the heir, in this caſe, can neither receive profit, or ſuffer loſs.*

Quam in fidei-commiſſarium.] The term *ceſtui que truſt*, uſed at preſent in our own law, ſeems in general to convey the meaning of the word *fidei-commiſſarius*; but yet not preciſely: it was therefore thought moſt proper to angliciſe it in the tranſlation, as we have no ſingle *Engliſh* word, adequate to the ſenſe of it: for a *fidei-commiſſary*, in the *Roman* law, denotes a perſon, who has a beneficial intereſt in an eſtate, which for a time is commited to the faith or truſt of another.

De quibus hæredibus et in quibus fidei-commiſſariis ſupra dicta locum habeant.

§ VIII. Nihil autem intereſt, utrum aliquis, ex aſſe hæres inſtitutus, aut totam hæreditatem aut pro parte reſtituere rogatur; an, ex parte hæres inſtitutus, aut totam eam partem, aut partem partis, reſtituere rogatur. Nam et hoc caſu eadem obſervari præcipimus, quæ in totius hæreditatis reſtitutione diximus.

§ 8. *But it makes no difference, whether an heir, who is inſtituted to the whole of an inheritance, is requeſted by the teſtator to reſtore the whole or a part of it only--- or whether an heir, who is nominated but to a part of an inheritance, is requeſted to reſtore that intire part, or only a portion of it; for we have ordained, that the ſame rule of law ſhall be obſerved, whether an heir is requeſted to reſtore the whole or a part only of an inheritance.*

De eo, quod hæres voluntate teſtatoris deducit, præcipitve.

§ IX. Si quis, una aliqua re deducta ſive præcepta, quæ quartam continet, (veluti fundo vel alia re,) rogatus ſit reſtituere hæreditatem, ſimili modo ex Trebelliano ſenatus-conſulto reſtitutio fiet, perinde ac ſi, quarta parte retenta, rogatus eſſet reliquam hæreditatem reſtituere. Sed illud intereſt, quod altero caſu, id eſt, cum deducta ſive præcepta aliqua re reſtituitur hæreditas, in ſolidum ex eo ſenatus-conſulto actiones transeuntur, et res, quæ remanet apud hæredem, ſine ullo onere hæreditario apud eum remanet, quaſi ex legato ei acquiſita: altero vero caſu, cum quarta parte retenta rogatus eſt hæres reſtituere hæreditatem, et reſtituit, ſcinduntur actiones, et pro dodrante quidem transeuntur ad fidei-commiſſarium, pro quadrante remanent apud hæredem. Quinetiam, licet una aliqua re deducta aut præcepta reſtituere aliquis hæreditatem

rogatus ſit, in qua maxima pars hæreditatis contineatur, æque in ſolidum transferuntur actiones. Et ſecum deliberare debet is, cui reſtituitur hæreditas, an expediat ſibi reſtitui. Eadem ſcilicet interveniunt, et ſi, duabus pluribuſve rebus deductis præceptiſve, reſtituere hæreditatem rogatus ſit. Sed et, ſi certa ſumma deducta præceptave, quæ quartam vel etiam maximam partem hæreditatis continet, rogatus ſit aliquis hæreditatem reſtituere, idem juris eſt. Quæ autem diximus de eo, qui ex aſſe inſtitutus eſt, eadem transferimus et ad eum, qui ex parte hæres ſcriptus eſt.

§ 9. *If an heir is requeſted to give up an inheritance, after deducting ſome particular thing, amounting to a fourth, as a piece of ground,* &c. *he may be compelled to give it up by the* Trebellian *decree, in the ſame manner, as if he had been requeſted to reſtore the remainder of an inheritance, after reſerving to himſelf a fourth. There is however this difference, that, in the one caſe, when an heir is requeſted to give up an inheritance, after deducting a particular thing, then all actions, paſſive as well as active, are transfered by virtue of the decree to the* fidei-commiſſary, *and what remains with the heir is free of all incumberance, as if acquired by legacy; and, in the other caſe, when an heir is requeſted in general terms to give up an inheritance, after retaining a fourth to himſelf, all actions are proportionably divided; thoſe, which regard the three fourths of the eſtate, being transfered to the* fidei-commiſſary; *and thoſe, which regard the ſingle fourth, remaining for the benefit of the heir. And, even if an heir is requeſted to give up an inheritance, after making a deduction of ſome particular thing, which amounts to the value of the greateſt part of it, all actions, both active and paſſive, are nevertheleſs transfered to the* fidei-commiſſary, *who ought therefore always well to conſider, whether it will be expedient or not, that the inheritance ſhould be given up to him. And the law is the ſame, whether an heir is requeſted to give up an inheritance after a deduction of two, or more, ſpecific things — or of a certain ſum of money, which exceeds in value the greateſt part of the inheritance. Thus what we have ſaid of an heir, who is inſtituted to the whole of an inheritance, is equally true of him, who is inſtituted only to a part.*

De fidei-commiſſis ab inteſtato relictis.

§ X. Præterea, inteſtatus quoque moriturus poteſt rogare eum, ad quem bona ſua vel legitimo jure vel honorario pertinere intelligit, ut hæreditatem ſuam totam, partemve ejus, aut rem aliquam, veluti fundum, hominem, pecuniam, alicui reſtituat: cum alioqui legata niſi ex teſtamento non valeant.

§ 10. *And farther, even a man, who is willing to die inteſtate, may requeſt the perſon, who he thinks will ſucceed him, either by the civil or prætorian law, to give up the whole inheritance, or a part of it, or any particular thing, as a piece of ground, a ſlave, a ſum of money,* &c. *But this liberty is granted to inteſtates in regard to truſts only; for legacies are not valid, unleſs they are bequeathed by teſtament.*

Cum alioqui legata.] It is ſtrictly true, that legacies, as ſuch, are not valid, unleſs bequeathed by teſtament; but by virtue of *Juſtinian*'s ordinance, [*Cod.* 6. *t.* 43.] which puts legacies and gifts in truſt upon an equality, whatever is bequeathed in a *codicil*, will be good, as a gift in truſt, tho' not as a legacy.

De

De fidei-commiſſo relicto a fidei-commiſſario.

§ XI. Eum quoque, cui aliquid reſtituitur, poteſt rogare, ut id rurſus alii, aut totum, aut partem, vel etiam aliquid aliud, reſtituat.

§ 11. *A* fidei-commiſſary *may alſo himſelf be requeſted to pay over, or give up, to another, either the whole, or a part, of what he receives; or even to give ſome other thing in lieu of it.*

De probatione fidei-commiſſi.

§ XII. Et, quia prima fidei-commiſſorum cunabula a fide hæredum pendent, et tam nomen, quam ſubſtantiam, acceperunt, ideo D. Auguſtus ad neceſſitatem juris ea retraxit. Nuper et nos, eundem principem ſuperare contendentes, ex facto, quod Tribonianus, vir excellentiſſimus, quæſtor ſacri palatii, ſuggeſſit, conſtitutionem fecimus, per quam diſpoſuimus, ſi teſtator fidei hæredis ſui commiſit, ut vel hæreditatem vel ſpeciale fidei-commiſſum reſtituat; et neque ex ſcriptura, neque ex quinque teſtium numero, qui in fidei-commiſſis legitimus eſſe noſcitur, poſſit res manifeſtari, ſed vel pauciores, vel nemo penitus teſtis intervenerit; tunc, ſive pater hæredis, ſive alius quicunque ſit, qui fidem hæredis elegerit, et ab eo reſtitui aliquid voluerit, ſi hæres perfidia tentus adimplere fidem recuſat, negando rem ita eſſe ſubſecutam; ſi fidei-commiſſarius ei jusjurandum detulerit, cum prius ipſe de calumnia juraverit, neceſſe eum habere, vel jusjurandum ſubire, quod nihil tale a teſtatore audiverit, vel recuſantem ad fidei-commiſſi vel univerſalis vel ſpecialis ſolutionem coarctari; ne depereat ultima voluntas teſtatoris fidei hæredis commiſſa. Eadem obſervari cenſuimus, etſi a legatario vel fidei-commiſſario aliquid ſimiliter relictum ſit. Quod ſi is, a quo relictum dicitur, [poſtquam negaverit,] confiteatur quidem, aliquid a ſe relictum eſſe, ſed ad legis ſubtilitatem recurrat, omnino ſolvere cogendus eſt.

§ 12. *All fiduciary gifts or bequeſts depended formerly in a precarious manner upon the ſole* faith *of the heir; from which they took as well their name as their eſſence; and the emperor* Auguſtus *was the firſt, who thought it proper to reduce them under a judicial cogniſance. But we have ſince indeavored to exceed that prince; and, at the inſtance of that moſt excellent man* Tribonian, *the queſtor of our palace, we have enacted by our conſtitution, that, if a teſtator hath truſted to the faith of his heir for the ſurrender of an inheritance, or any particular thing, and this truſt cannot be made manifeſt by the depoſitions of five witneſſes, (which is known to be the legal number in ſuch caſes,) there having been not ſo many, or perhaps no witneſſes preſent, the heir at the ſame time perfidiouſly refuſing to make any payment, and denying the whole tranſaction, then in this caſe the* fidei-commiſſary, *having previouſly taken the oath of calumny, may put the heir, altho' he is even the ſon of the teſtator, to his oath, and thus force him either to deny the truſt upon oath, or comply with it, whether the truſt is univerſal or particular; and this is allowed, leſt*

leſt the laſt will of a teſtator, commited to the faith of an heir, ſhould be defeated. And we have thought it right, that the ſame remedy ſhould be taken againſt a legatary, or even a fidei-commiſſary, *to whom a teſtator hath left any thing with a requeſt to give it up. And, if any man, to whom ſomething hath been left in truſt to be given to another, ſhould confeſs the truſt,* [*after he hath denied it,*] *but indeavor at the ſame time to ſhelter himſelf under the ſubtility of the law, he may nevertheleſs be compelled to perform his duty.*

De calumnia juraverit.] *vid. Cod.* 6. *t.* 42. *l.* 32.

TITULUS VIGESIMUS-QUARTUS.

De ſingulis rebus per fidei-commiſſum relictis.

Summa.

POTEST tamen quis etiam ſingulas res per fidei-commiſſum relinquere; veluti fundum, argentum, hominem, veſtem, et pecuniam numeratam; et vel ipſum hæredem rogare, ut alicui reſtituat, vel legatarium, quamvis a legatario legari non poſſit.

A man may alſo leave particular things in truſt; as a field, ſylver, cloaths, or a certain ſum of money; — and may requeſt either his heir to reſtore them, or even a legatary; altho' a legatary cannot be made chargeable with a legacy.

Quamvis a legatario.] This was the antient law; but by *Juſtinian*'s conſtitution [*Cod.* 6. *t.* 43.] legacies, and gifts in truſt, are allowed to come in aid of each other reciprocally, ſo that, to uſe the words of the ordinance; *omnia, quæ naturaliter inſunt legatis, et fidei-commiſſis inhærere intelligantur; et contra quicquid fidei-committitur, hoc intelligatur eſſe legatum* — from which it follows, that a legatary may now be charged with the payment of a legacy.

Quæ relinqui poſſunt.

§ I. Poteſt autem non ſolum proprias res teſtator per fidei-commiſſum relinquere, ſed et hæredis, aut legatarii, aut fidei-commiſſarii, aut cujuslibet alterius. Itaque et legatarius et fidei-commiſſarius non ſolum de ea re rogari poteſt, ut eam alicui reſtituat, quæ ei relicta ſit: ſed etiam de alia, ſive ipſius, ſive aliena ſit. Hoc ſolum obſervandum eſt, ne plus quiſquam rogetur alicui reſtituere, quam ipſe ex teſtamento ceperit: nam, quod amplius eſt, inutiliter relinquitur. Cum autem aliena res per fidei-commiſſum relinquitur, neceſſe eſt ei, qui rogatus eſt, aut ipſam rem redimere et præſtare, aut æſtimationem ejus ſolvere.

§ 1. *A teſtator may leave not only his own property in truſt, but alſo the property of his heir, of a legatary, of a* fidei-commiſſary, *or of any other: ſo that a legatary or* fidei-commiſſary *may not only be requeſted to give what hath been left to him, but what is his own, or even what is the property of another. And the only caution neceſſary to be obſerved by the teſtator is, that no man be requeſted to give more,*

more, than he hath received by means of the teſtament; for the exceſs will be ineffectually bequeathed. And, when the property of another is left in truſt, the perſon, requeſted to reſtore it, is obliged either to obtain from the proprietor the very thing bequeathed, or to pay the value of it.

De libertate.

§ II. Libertas quoque ſervo per fidei-commiſſum dari poteſt, ut hæres eum rogetur manumittere, vel legatarius, vel fidei-commiſſarius: nec intereſt, utrum de ſuo proprio ſervo teſtator roget, an de eo, qui ipſius hæredis, aut legatarii, vel etiam extranei ſit: itaque et alienus ſervus redimi et manumitti debet. Quod ſi dominus eum non vendat, (ſi modo nihil ex judicio ejus, qui reliquit libertatem, perceperit,) non ſtatim extinguitur fidei-commiſſaria libertas, ſed differtur, quoad poſſit tempore procedente, ubicumque occaſio ſervi redimendi fuerit, præſtari libertas. Qui autem ex fidei-commiſſi cauſa manumittitur, non teſtatoris fit libertus, etiamſi teſtatoris ſervus ſit, ſed ejus, qui manumittit. At is, qui directo ex teſtamento liber eſſe jubetur, ipſius teſtatoris libertus fit; qui etiam Orcinus appellatur. Nec alius ullus directo ex teſtamento libertatem habere poteſt, quam qui utroque tempore teſtatoris fuerit, et quo faceret teſtamentum, et quo moreretur. Directo autem libertas tunc dari videtur, cum non ab alio ſervum manumitti rogat, ſed velut ex ſuo teſtamento libertatem ei competere vult.

§ 2. *Liberty may alſo be confered upon a ſlave by virtue of a truſt; for an heir, a legatary, or a* fidei-commiſſary, *may be requeſted to manumit: nor does it make any difference, whether the teſtator requeſts the manumiſſion of his own ſlave, of the ſlave of his heir, of the ſlave of a legatary, or of the ſlave of a ſtranger: and therefore, when a ſlave is not the teſtator's own property, he muſt be bought, if poſſible, and manumitted. But, if the proprietor of the ſlave refuſes to ſell him, (which refuſal the proprietor may juſtify, if he hath taken nothing under the will of the teſtator,) yet the fiduciary bequeſt is not extinguiſhed, but defered only, till it can be conveniently performed. It is here to be obſerved, that he, who is manumitted in conſequence of a truſt, does not become the freedman of the teſtator, altho' he was the teſtator's own ſlave, but he becomes the freedman of the manumittor: but a ſlave, to whom liberty is directly given by teſtament, becomes the freedman of the teſtator, and is called* Orcinus; *and no one can obtain liberty directly by teſtament, unleſs he was the ſlave of the teſtator, not only at the time of the teſtator's death, but alſo at the time of the making of his teſtament. And liberty is underſtood to be directly given, not when a teſtator requeſts, that his ſlave ſhall be made free by another, but when he commands, that the freedom of his ſlave ſhall commence inſtantly by virtue of his teſtament.*

De verbis fidei-commiſſorum.

§ III. Verba autem fidei-commiſſorum hæc maxime in uſu habentur: *peto, rogo, volo, mando, fidei tuæ committo*: quæ perinde ſingula firma ſunt, atque ſi omnia in unum congeſta eſſent.

§ 3. *The*

§ 3. *The terms generally uſed in the commitment of truſts are the following* : —— peto, rogo, volo, mando, fidei tuæ committo : — *any of which words, ſingly taken, is as firm and binding, as if all were joined together.*

TITULUS VIGESIMUS-QUINTUS.

De codicillis.

D. xxix. T. 7. C. vi. T. 36.

Codicillorum origo.

ANTE Auguſti tempora conſtat, codicillorum jus in uſu non fuiſſe: ſed primus Lucius Lentulus, ex cujus perſona etiam fidei-commiſſa eſſe cœperunt, codicillos introduxit. Nam, cum decederet in Africa, ſcripſit codicillos teſtamento confirmatos, quibus ab Auguſto petiit per fidei-commiſſum, ut faceret aliquid. Et, cum D. Auguſtus voluntatem ejus impleſſet, deinceps reliqui, ejus auctoritatem ſecuti, fidei-commiſſa præſtabant: et filia Lentuli legata, quæ jure non debebat, ſolvit. Dicitur autem Auguſtus convocaſſe ſapientes viros, interque eos Trebatium quoque, cujus tunc auctoritas maxima erat, et quæſiſſe, an poſſet recipi hoc, nec abſonans a juris ratione codicillorum uſus eſſet? et Trebatium ſuaſiſſe Auguſto, quod diceret, utiliſſimum et neceſſarium hoc civibus eſſe, propter magnas et longas peregrinationes, quæ apud veteres fuiſſent: ubi, ſi quis teſtamentum facere non poſſet, tamen codicillos poſſet. Poſt quæ tempora, cum et Labeo codicillos feciſſet, jam nemini dubium erat, quin codicilli jure optimo admitterentur.

It is certain, that codicils were not in frequent uſe before the reign of Auguſtus: *for* Lucius Lentulus, *by whoſe means truſts became efficatious, was the firſt, who cauſed authority to be given to codicils. When he was dying in* Africa, *he wrote ſeveral codicils, which were confirmed by his teſtament; and in theſe he requeſted* Auguſtus *to perform ſome particular act in conſequence of a truſt: the emperor complied with the requeſt; and many other perſons afterwards, being influenced by the authority of the emperor's example, punctually performed truſts, which had been committed to their charge: and the daughter of* Lentulus *paid debts, which in ſtrictneſs of law were not due. But it is reported, that* Auguſtus, *having convened upon this occaſion the ſages of the law, and alſo* Trebatius, *whoſe opinion was of the greateſt authority, demanded, whether codicils could be admitted to be of force, and whether they were not repugnant to the very reaſon of the law?*

to

to which Trebatius *answered, that codicils were not only most convenient, but most necessary on account of the great and long voyages, which the* Romans *were frequently obliged to take, to the intent, that, where a man could not make a testament, he might bequeath his effects by codicil. And afterwards, when* Labeo, *a lawyer of great eminence, disposed of his own property by codicil, it was no longer a doubt, but that codicils might be legally allowed.*

Codicillorum jus.] The word *codicillus*, or codicil, is a diminutive from *codex*, a book; and denotes any unsolemn last will, in which no heir or executor is named. "Codicilli dicti "sunt parvi codices, id est, tabellæ ex codi- "cibus aut ligno. Itaque, quemadmodum "testamentum *codex* appellatur,

"*Codice* sævo

"Hæredes vetat esse suos, &c. *Juv. Sat.* 10. "quia testamentum in codicibus tantum scri- "bebatur, sive tabulis grandioribus, ita vo- "luntas suprema, minus solemnis aut plena, "*codicilli*, et aliquando numero unitatis *codi-* "*cillus*; propterea quod scribi solita erat in co- "dicillis, id est, tabulis brevioribus et tenuio- "ribus, ita factis, ut facile, quo cuique com- "modum esset, circumferri possent. Heineccio "autem judice, *codicilli* apud veteres sunt e- "pistolæ, vel scripturæ ad alios missæ: quia "ergo codicilli plerumque perscribebantur in "forma epistolarum, hinc et nomen retinu- "erunt." *Vinn.*

Codicilli fieri possunt vel ante, vel post testamentum, imo etiam ab intestato.

§ I. Non tantum autem testamento facto potest quis codicillos facere, sed et intestatus quis decedens fidei-committere codicillis potest. Sed, cum ante testamentum factum codicilli facti erant, Papinianus ait, non aliter vires habere, quam si speciali voluntate postea confirmentur. Sed Divi Severus et Antoninus rescripserunt, ex iis codicillis, qui testamentum præcedunt, posse fidei-commissum peti, si appareat, eum, qui testamentum fecit, a voluntate, quam in codicillis expresserat, non recessisse.

§ 1. *Not only he, who hath already made his testament, is permitted to make a codicil, but even an intestate may commit a trust to others by codicil. Yet, when a codicil is antecedent to a testament, the codicil, according to* Papinian, *cannot otherwise take effect, than by being confirmed by the subsequent testament. But the emperors* SEVERUS *and* ANTONINUS *have by rescript declared, that a thing, left in trust in a codicil preceding a testament, may be demanded by the* fidei-commissary, *if it appears, that the testator hath not receded from the intention, which he at first expressed in his codicil.*

Non tantum testamentum] "It is granted of "all, [says *Stockmann*,] "that a codicil may be "made either by him, who dieth intestate, or "by him, who dieth with a testament. If "the codicil is made by a person, who dies in- "testate, the legacies therein must be paid by "him, who shall have the administration of the "goods of the deceased, with the codicil or "testamentary schedule annexed. And, if a "codicil is made by him, who hath also made "a regular testament, then, whether it was "made before or after the testament, it is to "be reputed as part and parcel of the testa- "ment, and is to be performed as well as the "testament; unless, being made before the "testament, it appears to be revoked by the "testament, or to be contrary to that, which "is contained in the true testament." *Stockm.* part 1. dec. 5.

"Codicilli et ab intestato confici possunt, et "facto testamento. Ab intestato facti suis "ipsi viribus nituntur et vicem testamenti exhi- "bent: proinde cuicunque incubuit hæres for- "erit, sive legitimus, sive honorarius, etiam "postea natus, codicillis relicta præstabit. "Testamento autem condito, codicilli quos-

" cunque tempore facti fuerint, ad teſtamen- " tum pertinent, vireſque ex eo capiunt, eti- " amſi in eo confirmati non ſint; et infirmato " teſtamento codicilli concidunt. Illud vero " intereſt inter codicillos teſtamento nominatim " confirmatos et non confirmatos, quod illis " relicta etiam directo jure valent, veluti le- " gata et libertates directo datæ; perindeque " omnia habeantur, ac ſi in teſtamento ſcripta " eſſent, excepta cauſa hæreditatis: at quæ co- " dicillis non confirmatis relicta ſunt, ſive ver- " bis directis ſive precariis, debentur jure fi- " dei-commiſſi. Sed non eſt, quod de his " amplius dicamus; cum enim confuſa nunc " ſit legatorum et fidei-commiſſorum natura, " dubitandum non eſt, quin legata, codicillis " etiam non confirmatis data directo, nunc va- " leant." *Vinn.*

Codicillis hæreditas directo dari non poteſt.

§ II. Codicillis autem hæreditas neque dari, neque adimi, poteſt; ne confundatur jus teſtamentorum et codicillorum: et ideo nec exhæredatio ſcribi. Directo autem hæreditas codicillis neque dari neque adimi poteſt: nam per fidei-commiſſum hæreditas codicillis jure relinquitur. Nec conditionem hæredi inſtituto codicillis adjicere, neque ſubſtituere directo, quis poteſt.

§ 2. *But an inheritance can neither be given nor taken away by codicil, leſt the different operations of teſtaments and codicils ſhould be confounded: and of courſe an heir can not be diſinherited by codicil.* —— *But, altho' an inheritance can neither be given nor taken away by codicil, in* direct *terms, yet it may be legally left from the heir in a codicil by means of a truſt or* fidei-commiſſum. *But no man is allowed to impoſe a condition upon his heir by codicil, nor to ſubſtitute* directly.

Codicillis autem hæreditas.] *Groenewegen*, in his book of abrogated laws, ſays, that the diſtinctions between teſtaments and codicils have now ceaſed to be obſerved almoſt every where. *Eandem enim ordinationis ſolemnitatem requirunt, atque ita ſuprema Hollandiæ curia cenſuit; et confuſis eorum nominibus hæredi inſtitutionem ad ſubſtantiam teſtamenti neceſſariam eſſe negant pragmatici; hinc quoque codicillis hæreditatem directo dari et adimi, adeoque et exhæredationem ſcribi, moribus noſtris nil vetat.* Groenew. de ll. abr. in Inſt. 2. t. 21.

In *England* the appointment of an executor makes the only difference between a teſtament and a codicil; and this difference is little more than nominal; for whatever may be done by the one, may be alſo done by the other; ſo that a condition may be impoſed, an eſtate may be given, or an heir diſinherited, as well by codicil as by teſtament; and even lands may be diſpoſed of by a codicil, if it is ſigned by the deceaſed, and atteſted by three witneſſes in his preſence, tho' the deceaſed left no teſtament, (for a codicil, in it's true ſenſe, denotes any teſtamentary ſchedule, and may ſtand ſingly, without relation to any other paper;) and, even where there is a teſtament, diſpoſing of real eſtate, that teſtament may be altered or revoked by a codicil properly executed. And, where perſonal eſtate only is bequeathed, the ſame degree of proof, (and it has already been ſaid what degree of proof is ſufficient,) will eſtabliſh either a teſtament or a codicil; and the one may revoke or confirm the other, either wholly or in part, according to it's reſpective contents.

De numero et ſolemnitate.

§ III. Codicillos autem etiam plures quis facere poteſt: et nullam ſolemnitatem ordinationis deſiderant.

§ 3. *A man may make many codicils, and they require no ſolemnity.*

Nullam ſolemnitatem.] When it is ſaid, that no ſolemnity is required in making a codicil, the compilers of the inſtitutions muſt be underſtood to mean no extraordinary ſolemnity, as that of bringing ſeven witneſſes to ſubſcribe it, as in caſe of a teſtament: for it is neceſſary by the civil law, that a codicil ſhould be ſupported by five witneſſes; [*Cod.* 6. *t.* 36. *l.* 8.] which is the

the ordinary number required to atteſt ſeveral other tranſactions. [*Cod.* 4. *t.* 20. *l.* 18.] But, in *England*, there is in this reſpect no diſtinction between a teſtament and a codicil; for either may be ſupported by an equal number of witneſſes: —— two are regularly required to a teſtament, and the ſame number is alſo required to a codicil; but, if either a teſtament, or a codicil, contains a deviſe of a real eſtate, three witneſſes are indiſpenſably neceſſary by act of parliament. *vid.* 29. *Car.* 2. *cap.* 3.

FINIS LIBRI SECUNDI.

DIVI JUSTINIANI
INSTITUTIONUM
LIBER TERTIUS.

TITULUS PRIMUS.

De hæreditatibus, quæ ab inteſtato deferuntur.

D. xxxviii. T. 16. C. vi. T. 55 et 58. Nov. 118.

Definitio inteſtati.

INTESTATUS decedit, qui aut omnino teſtamentum non fecit, aut non jure fecit; aut id, quod fecerat, ruptum irritumve factum eſt; aut ſi ex eo nemo hæres extiterit.

Every perſon is ſaid to die inteſtate, who hath either not made a teſtament; or, if he has made one, hath neglected to uſe the ſolemnities preſcribed by law. A man is alſo ſaid to die inteſtate, if his teſtament, altho' rightly made, is either cancelled or rendered void; or if no one will take upon himſelf the heirſhip by virtue of the teſtament.

Primus ordo ſuccedentium ab inteſtato.

§ I. Inteſtatorum autem hæreditates ex lege duodecim tabularum primum ad ſuos hæredes pertinent.

§ 1. *The inheritances of inteſtates, according to the law of the twelve tables, belong primarily to the* ſui hæredes; i. e. *to the proper or domeſtic heirs of ſuch inteſtates.*

Ex lege duodecim tabularum.] This law of the 12 tables is not extant.

Qui ſunt ſui hæredes.

§ II. Sui autem hæredes exiſtimantur, (ut ſupra diximus,) qui in poteſtate morientis fuerint; veluti filius filiave, nepos neptiſve ex filio, pronepos proneptiſve ex nepote, ex filio nato prognatus prognatave: nec in-

tereſt, utrum naturales ſint liberi, an adoptivi. Quibus connumerari neceſſe eſt etiam eos, qui ex legitimis quidem nuptiis vel matrimoniis non ſunt progeniti, curiis tamen civitatum dati, ſecundum Divalium conſtitutionum, quæ ſuper his poſita ſunt, tenorem, hæredum ſuorum jura nanciſcuntur: nec non eos, quos noſtræ amplexæ ſunt conſtitutiones, per quas juſſimus, ſi quis mulierem in ſuo contubernio copulaverit, non ab initio affectione maritali, eam tamen, cum qua poterat habere conjugium, et ex ea liberos ſuſtulerit, poſtea vero, affectione procedente, etiam nuptialia inſtrumenta cum ea fecerit, et filios vel filias habuerit, non ſolum eos liberos, qui poſt dotem editi ſunt, juſtos et in poteſtate patris eſſe; ſed etiam anteriores, qui et iis, qui poſtea nati ſunt, occaſionem legitimi nominis præſtiterunt. Quod obtinere cenſuimus, etſi non progeniti fuerint poſt dotale inſtrumentum confectum liberi, vel etiam nati ab hac luce fuerint ſubtracti. Ita demum tamen nepos neptiſve, pronepos proneptiſve, ſuorum hæredum numero ſunt, ſi præcedens perſona deſierit in poteſtate parentis eſſe, ſive morte id acciderit, ſive alia ratione, veluti emancipatione. Nam, ſi per id tempus, quo quis moritur, filius in poteſtate ejus ſit, nepos ex eo ſuus hæres eſſe non poteſt: idque et in cæteris liberorum perſonis dictum intelligimus. Poſthumi quoque, qui, ſi vivo patre nati eſſent, in poteſtate ejus futuri forent, ſui hæredes ſunt.

§ 2. *And, as we have obſerved before, thoſe are eſteemed* ſui hæredes *or proper heirs, who, at the time of the death of the deceaſed, were under his power: as a ſon or a daughter, a grandſon or a grand-daughter by a ſon, a great-grandſon or great-grand-daughter by a grandſon of a ſon,* &c. —— *neither is it material, whether theſe children are natural or adopted. But, in the number of natural children, we muſt reckon thoſe, who, altho' they were not born in lawful wedlock, are nevertheleſs, according to the tenor of the imperial conſtitutions, intituled to the rights of proper heirs, by being admited into the order of Decurions. We muſt alſo add thoſe perſons, who are comprized within our own conſtitutions, by which it is ordained, that, if any perſon, without intending matrimony, ſhall keep a woman, with whom he is not prohibited to marry, and have children by her, and ſhall afterwards, thro' the dictates of affection, marry that woman, and have other children by her, ſons or daughters, then not only theſe latter children, born after the celebration of marriage, ſhall be legitimate and in the power of their father, but alſo the former, who gave occaſion to the legitimacy of thoſe, who were born afterwards. And we have thought it expedient, that this law ſhall alſo obtain in regard to the children born before marriage, altho' the children, born ſubſequent to it, are dead; or even altho' there never were any children ſubſequent to the marriage. But a grandſon or grand-daughter, a great-grandſon or great-grand-daughter, is not reckoned in the number of proper heirs, unleſs the perſon preceding them in degree hath ceaſed to be under paternal power, either by death or ſome other means, as by emancipation: for, if a ſon, when his father died, was under the power of his father, the grandſon can by no means be the proper or domeſtic heir of his grand-father; and, by a parity of reaſoning, this rule is underſtood to take place in relation to all deſcendents in the right line. But all poſthumous children, who would have been under the power of their father, if they had been born in his life-time, are eſteemed* ſui heredes, *or proper heirs.*

Naturales

Naturales ſint.] The word *natural* here ſignifies legitimate; in which ſenſe it is always uſed, when oppoſed to the term *adopted*.

Divalium conſtitutionum.] *vid. Cod.* 5. *t.* 27. *ll.* 3, 4. *Nov.* 89. *cap.* 2.

Noſtræ amplexæ ſunt conſtitutiones.] *vid. Cod.* 5. *t.* 27. *ll.* 10, 11.

Quomodo ſui hæredes fiunt.

§ III. Sui autem hæredes fiunt etiam ignorantes, et, licet furioſi ſint, hæredes poſſunt exiſtere: quia, quibus ex cauſis ignorantibus nobis acquiritur, ex his cauſis et furioſis acquiri poteſt. Et ſtatim à morte parentis quaſi continuatur dominium; et ideo nec tutoris auctoritate opus eſt pupillis, cum etiam ignorantibus acquiratur ſuis hæredibus hæreditas: nec curatoris aſſenſu acquiritur furioſo, ſed ipſo jure.

§ 3. *Perſons may become* ſui hæredes, *or proper heirs, without their knowledge, and even altho' they are diſordered in their ſenſes: for, as inheritances may be acquired without our knowledge, it is a conſequence, that they may alſo be acquired by perſons deprived of their underſtanding. And here obſerve, that the dominion of an inheritance is continued in the heir from the very inſtant of the death of his anceſtor, and that the authority of a Tutor is not neceſſary to inable a pupil to inherit, becauſe inheritances may be acquired by proper heirs, without their knowledge: neither does a diſordered perſon inherit by the aſſent of his curator, but by operation of law.*

A morte parentum.] Perſons are ſaid to be *ſui hæredes*, or proper heirs, *quod non alienarum ſed ſuarum, ſive propriarum, quodammodo rerum hæredes eſſe videantur*. i. e. becauſe they ſeem to be the heirs of their own property, and not the heirs of another's: for a proper heir is, in the life-time of his parent, the co-heir or partener with that parent in his poſſeſſions; ſo that a ſon, who is a proper heir, does not acquire a new property at the death of his father, but only poſſeſſes in a fuller manner what was before veſted in him. *Vinny, h. t.*

De filio, poſt mortem patris, ab hoſtibus reverſo.

§ IV. Interdum autem, licet in poteſtate parentis mortis tempore ſuus hæres non fuerit, tamen ſuus hæres parenti efficitur: veluti ſi ab hoſtibus quis reverſus fuerit poſt mortem patris ſui: jus enim poſtliminii hoc facit.

§ 4. *But ſometimes a child becomes a proper heir, altho' he was not under power, at the time of the death of his parent, as when a perſon returns from captivity after the death of his father: and this is effected by the* jus poſtliminii, *or right of return.*

De memoria patris damnata ob crimen perduellionis.

§ V. Per contrarium autem hoc evenit, ut, licet quis in familia defuncti ſit mortis tempore, tamen ſuus hæres non fiat; veluti ſi poſt mortem ſuam pater judicatus fuerit perduellionis reus, ac per hoc memoria ejus damnata fuerit. Suum enim hæredem habere non poteſt, cum fiſcus ei ſuccedat: ſed poteſt dici, ipſo quidem jure ſuum hæredem eſſe, ſed deſinere.

§ 5. *On the contrary, it may happen, that a child, who at the time of the death of his Parent, was under his power, ſhall not be his proper heir: as when a parent,*

after his deceaſe, is adjudged to have been guilty of leſe-majeſty, by which crime his memory is rendered infamous; for a criminal of this ſort can have no proper heir, inaſmuch as all his poſſeſſions are forfeited to the treaſury. But a ſon, in this caſe, may ſtrictly be ſaid to have been *the proper heir of his father, and afterwards to have ceaſed to be ſo.*

De diviſione hæreditatis inter ſuos hæredes.

§ VI. Cum filius filiave et ex altero filio nepos neptiſve exiſtunt, pariter ad hæreditatem avi vocantur, nec, qui gradu proximior eſt, ulteriorem excludit. Æquum enim eſſe videtur, nepotes nepteſve in patris ſui locum ſuccedere. Pari ratione et ſi nepos neptiſve ſit ex filio, et ex nepote pronepos proneptiſve, ſimul vocantur. Et, quia placuit, nepotes nepteſve, item pronepotes pronepteſve, in parentis ſui locum ſuccedere, conveniens eſſe viſum eſt, non in capita, ſed in ſtirpes, hæreditatem dividi; ut filius partem dimidiam hæreditatis habeat, et ex altero filio duo plureſve nepotes alteram dimidiam. Item, ſi ex duobus filiis nepotes nepteſve exiſtant, ex altero unus aut duo forte, ex altero tres aut quatuor, ad unum aut duos dimidia pars pertineat, ad tres vel quatuor altera dimidia.

§ 6. *When there is a ſon or a daughter, and a grandſon or grand-daughter by another ſon, they are called equally to the inheritance of their parents; nor does the neareſt exclude the more remote: for it appears juſt, that grandſons and grand-daughters ſhould ſucceed in the place of their father. And, by the ſame reaſoning, if there is a grandſon or grand-daughter by a ſon, and a great grandſon or great-grand-daughter by a grandſon, they ought all to be called to the inheritance. And, inaſmuch as it hath been eſteemed right, that grandſons and grand-daughters, great-grandſons and great grand-daughters, ſhould ſucceed in the place of their parent, it ſeemed convenient, that inheritances ſhould not be divided into* capita, *but into* ſtirpes: *ſo that, where there is a ſon and grand-children by another ſon, the ſon poſſeſſes half the inheritance, and the grand-children, however numerous, are intituled only to the other half, as the repreſentatives of their father. And in like manner, where there are grand-children by two ſons, the one ſon leaving one or two children, and the other three or four, the inheritance muſt be equally divided, half belonging to the ſingle grand-child, or the two grand-children by the one ſon, and half to the three or four grand-children by the other ſon.*

Item ex duobus filiis.] By the civil law, repreſentation takes place *in infinitum* in the right line deſcending, and therefore it follows, according to that law, that, when any perſon dies, leaving grand-children by ſons or daughters, who died in his life-time, ſuch grand-children, tho' equal in degree and unequal in their number in regard to their reſpective ſtocks, will divide the eſtate of their grand-father *per ſtirpes*, *i.e.* according to their ſtocks: for example, if *A* dies worth nine hundred *aurei*, and inteſtate, leaving only grand-children by three ſons, already dead, to wit, three grand-children by one ſon, five by another, and ſix by another, then each of theſe claſſes of grand-children would be intituled to a third, that is, to three hundred *aurei*, no regard being paid to that claſs, in which there were moſt perſons. *In hoc caſu,* (ſays *Vinnius,*) *maxime conſpicua eſt vis repræſentationis; licet enim omnes hic pari gradu ſint, ut proprio ſinguli jure ſuccedere poſſe videantur, tamen poſtquam ſemel placuit, nepotes in locum patris ſui demortui, aliave ratione exuti jure ſui hæredis, ſuccedere, non debuit hoc jus ex accidenti aliquo variari, puta ut ſoli nepotes ex diverſis filiis et numero inæquales, ceu pauciores cum pluribus ex hac vel illa ſtirpe concurrentes, in capita hæreditatem dividerent.* Cod. 6. t. 55. *l.* 2. *Quare ſic in univerſum recte definiemus, deſcendentes ex maſculis omnes, qui ſunt diverſarum ſtirpium, quantumvis ejuſdem omnes gradus,*

dus, in ſtirpes, non in capita, ſuccedere. But, in *England*, altho' repreſentation may alſo be ſaid to extend *in infinitum* in the right line deſcending, yet this I apprehend muſt be underſtood to be in thoſe caſes only, where repreſentation is abſolutely *neceſſary* to prevent the excluſion of grand-children, great-grand-children, *&c.* For example therefore, if *Titius* dies leaving a ſon, and *D*, *E*, *F*, his grand-children by another ſon, who died before *Titius*, then the ſurviving ſon would take one moity, and the grand-children *D*, *E*, *F*, would take the other, as the repreſentatives of their deceaſed father: for in this caſe repreſentation would be *neceſſary*; becauſe, if repreſentation was not allowed, the grand-children of *Titius*, being in a more remote degree, than his ſon, would be totally excluded; which would be highly unjuſt. But, if *Titius* dies, and leaves only grand-children by two ſons, already dead, *e. g.* three grand-children by one ſon, and ſix by the other, then repreſentation would not only not be neceſſary, (as all perſons are in the ſame degree, ſo that none of them can be excluded;) but it would occaſion a very unequal diſtribution of the effects; namely, of only half the eſtate to ſix of the grand-children, and of half to the other three, which does not ſeem agreeable either to the ſenſe, or even the words of the ſtatute. See 22, 23, *Car.*2. *cap.*10.

Quo tempore ſuitas ſpectatur.

§ VII. Cum autem quæritur, an quis ſuus hæres exiſtere poſſit, eo tempore quærendum eſt, quo certum eſt, aliquem ſine teſtamento deceſſiſſe: quod accidit et deſtituto teſtamento. Hac ratione, ſi filius exhæredatus fuerit et extraneus hæres inſtitutus, et, filio mortuo, poſtea certum fuerit, hæredem inſtitutum ex teſtamento non fieri hæredem, aut quia noluit eſſe hæres, aut quia non potuit, nepos avo ſuus hæres exiſtet: quia, quo tempore certum eſt, inteſtatum deceſſiſſe patrem-familias, ſolus invenitur nepos: et hoc certum eſt.

§ 7. *Whenever it is demanded, whether any perſon is a proper heir, we muſt inquire at what time it was certain, that the deceaſed died without a teſtament; and a man is ſaid to die without a teſtament, if his teſtament is relinquiſhed. Thus if a ſon is diſinherited and a ſtranger is inſtituted heir, and, after the death of the ſon, it becomes certain, that the inſtituted heir was not in fact the heir, either becauſe he was unwilling, or unable, to accept the inheritance, in this caſe, the grandſon of the deceaſed becomes the proper heir of his grandfather: for at the time, when it was certain, that the deceaſed died inteſtate, there was no other heir, but the grandchild; and this is evident.*

De nato poſt mortem avi, vel adoptato à filio emancipato.

§ VIII. Et, licet poſt mortem avi natus ſit, tamen avo vivo conceptus, mortuo patre ejus, poſteaque deſerto avi teſtamento, ſuus hæres efficitur. Plane, ſi et conceptus et natus fuerit poſt mortem avi, mortuo patre ſuo, deſertoque poſtea avi teſtamento, ſuus hæres avo non exiſtet; quia nullo jure cognationis patrem ſui patris attigit: ſed nec ille eſt inter liberos avi, quem filius emancipatus adoptavit. Hi autem, cum non ſint ſui, (quantum ad hæreditatem,) liberi, neque bonorum poſſeſſionem petere poſſunt, quaſi proximi cognati. Hæc de ſuis hæredibus.

§ 8. *And altho' a child is born after the death of his grandfather, yet, if he was conceived in the life-time of his grandfather, he will, at the death of his father and after his grandfather's teſtament is deſerted by the inſtituted heir, become the proper heir of his grandfather. But, if a child is both conceived and born after the death of his grandfather, ſuch child, altho' his father ſhould die and the teſtament of his grand-*

father

father be deſerted, could not become the proper heir of his grandfather; becauſe he was never allied to his grandfather by any tye of cognation. Neither is he, whom an emancipated ſon hath adopted, to be reckoned in any reſpect among the children of his adoptive father's father. So that the adopted children of an emancipated ſon can neither become the proper heirs of their father's father in regard to the inheritance, nor demand the poſſeſſion of goods, as next of kin. This is what we have thought it expedient to obſerve concerning proper heirs.

Plane ſi et conceptus et natus.] "Sunt, qui "velint hunc nepotem, etſi ad hæreditatem avi "jure ſuo non veniat, poſſe nihilominus jure "paterno eam adipiſci: etenim certum eſt, libe- "ros parentum hæreditatem, quantumvis non ac- "quiſitam, ad liberos ſuos tranſmittere. *Cod.* "6. *t.* 51. *l.* 1. *ſect.* 5. *Cod.* 6. *t.* 52. *l.* 1." "Filius porro in propoſita facti ſpecie, ſi adhuc "viveret, poſſet patris hæreditatem acquirere; "ſic igitur ad filium ſuum poſthumum, etſi poſt "avi mortem conceptum, hæreditatem ejus "tranſmittere poſſe putant. *Pileus* nepoti huic, "per Novellam 118, ſuccurſum eſſe cenſet, ut "ſuo jure avo ſuccedere poſſit; et hoc quidem "ſuadet æquitas; ſed non favent ſatis perſpicue "verba legum." *Doujacius.*

De liberis emancipatis.

§ IX. Emancipati autem liberi jure civili nihil juris habent: neque enim ſui hæredes ſunt, qui in poteſtate morientis eſſe deſierunt, neque ullo alio jure per legem duodecim tabularum vocantur. Sed prætor, naturali æquitate motus, dat eis bonorum poſſeſſionem *unde liberi*, perinde ac ſi in poteſtate parentis tempore mortis fuiſſent; ſive ſoli ſint, ſive cum ſuis hæredibus concurrant. Itaque, duobus liberis exiſtentibus, emancipato uno, et eo, qui tempore mortis in poteſtate fuerit, ſane quidem is, qui in poteſtate fuit, ſolus jure civili hæres eſt, et ſolus ſuus hæres: ſed, cum emancipatus, beneficio prætoris, in partem admittitur, evenit, ut ſuus hæres pro parte hæres fiat.

§ 9. *Emancipated children by the civil law have no right to the inheritances of their parents: for thoſe are not proper heirs, who have ceaſed to be under the power of their parent deceaſed, before his death, neither are they called to inherit by any other right according to the law of the twelve tables. But the prætor, induced by natural equity, grants them the poſſeſſion of goods, by the edict beginning,* unde liberi, *as fully, as if they had been under power at the time of the death of their parent; and the prætor grants this, whether they are ſole, or mixed with others, who are* proper heirs: *therefore, when there are two ſons, the one emancipated, and the other under power at the time of his father's death, the latter, by the civil law, is alone the heir, and alone the proper heir: but, when the emancipated ſon, by the indulgence of the prætor, is admitted to his ſhare, then the proper heir becomes the heir only of his own moity.*

Si emancipatus ſe dederit in adoptionem.

§ X. At hi, qui emancipati à parente in adoptionem ſe dederunt, non admittuntur ad bona naturalis patris quaſi liberi, ſi modo, cum is moreretur, in adoptiva familia fuerint: nam vivo eo emancipati ab adoptivo patre perinde admittuntur ad bona naturalis patris, ac ſi emancipati ab ipſo eſſent, nec unquam in adoptiva familia fuiſſent: et convenienter, quod ad adoptivum patrem pertinet, extraneorum loco eſſe incipiunt. Poſt mortem vero

vero naturalis patris emancipati ab adoptivo patre, et, quantum ad hunc adoptivum patrem pertinet, æque extraneorum loco fiunt, et, quantum ad naturalis patris bona pertinet, nihilo magis liberorum gradum nanciſcuntur. Quod ideo ſic placuit, quia iniquum erat, eſſe in poteſtate patris adoptivi, ad quos bona naturalis patris pertineant, utrum ad liberos ejus, an ad agnatos.

§ 10. *But thoſe, who after emancipation have given themſelves in adoption, are not admited, as children, to the poſſeſſion of the effects of their natural father, if, at the time of his death, they were in the adoptive family. But, if in the life-time of their natural father they were emancipated by their adoptive father, they are then admited by the prætor to take the goods of their natural father, as if they had been emancipated by him, and had never entered into the family of the adoptor: and conſequently, in regard to their adoptive father, they are looked upon as mere ſtrangers. But thoſe, who are emancipated by their adoptive father, after the death of their natural father, are nevertheleſs reputed ſtrangers to their adoptive father; and, in regard to the inheritance of their natural father, they are not at all the more intituled to reaſſume the rank of children. Theſe rules of law have been eſtabliſhed, inaſmuch as it was unjuſt, that it ſhould be in the power of an adoptor to determine at his pleaſure, to whom the inheritance of a natural father ſhould appertain, whether to his children, or to his* agnates.

Ad liberos, an ad agnatos.] For the arrogator, by retaining under his power the emancipated ſon of the deceaſed, might make room for the *agnati* of the deceaſed; or, by emancipating his arrogated ſon, who was the natural ſon of the deceaſed, the arrogator might exclude the *agnati*; ſo that thus the right of inheritance would depend upon the will and pleaſure of a ſtranger, which the law would not permit.

Collatio filiorum naturalium et adoptivorum.

§ XI. Minus ergo juris habent adoptivi filii, quam naturales: namque naturales, emancipati beneficio prætoris, gradum liberorum retinent, licet jure civili perdant. Adoptivi vero emancipati et jure civili perdunt gradum liberorum, et à prætore non admittuntur: et recte. Naturalia enim jura civilis ratio perimere non poteſt; nec, quia deſinunt ſui hæredes eſſe, poſſunt deſinere filii filiæve, nepotes nepteſve eſſe. Adoptivi vero emancipati extraneorum loco incipiunt eſſe: quia jus nomenque filii filiæve, quod per adoptionem conſecuti ſunt, alia civili ratione, id eſt, emancipatione, perdunt.

§ 11. *Adopted children have therefore fewer rights and privileges, than natural children: for natural children, even after emancipation, retain the rank of children by the indulgence of the prætor, altho' they loſe it by the civil law: but adopted children, when emancipated, loſe the rank of children by the civil law, and are denied admitance into the rank of children by the prætor; and not without reaſon: for civil policy can by no means deſtroy natural rights; and thus natural children can not ceaſe to be ſons and daughters, grandſons and grand-daughters, altho' they may ceaſe to be proper heirs: but adopted children, when emancipated, commence inſtantly ſtrangers; for the right and name of ſon or daughter, which were obtained by the civil right of adoption, may be deſtroyed by another civil right; namely, by emancipation.*

§ XII.

De bonorum poſſeſſione contra tabulas.

§ XII. Eadem hæc obſervantur et in ea bonorum poſſeſſione, quam contra tabulas teſtamenti parentis liberis præteritis, id eſt, neque hæredibus inſtitutis, neque, ut oportet, exhæredatis, prætor pollicetur. Nam eos quidem, qui in poteſtate mortis tempore fuerint, et emancipatos, vocat prætor ad eandem bonorum poſſeſſionem; eos vero, qui in adoptiva familia fuerint per hoc tempus, quo naturalis parens moreretur, repellit. Item adoptivos liberos, emancipatos ab adoptivo patre, ſicut nec ab inteſtato, ita longe minus contra tabulas teſtamenti, ad bona ejus admittit: quia deſinunt in numero liberorum ejus eſſe.

§ 12. *The ſame rules are obſerved in regard to that poſſeſſion of goods, which the prætor, contrary to the teſtament of the parent, grants to the children, who are not mentioned in the teſtament, that is, to ſuch, who are neither inſtituted heirs, nor properly diſinherited. For the prætor calls thoſe, who were under power at the time of the death of their parents, and thoſe alſo, who are emancipated, to the ſame poſſeſſion of goods: but he repels thoſe, who were in an adoptive family at the time of the deceaſe of their natural parents. And, as the prætor admits not thoſe adopted children, who have been emancipated by their adoptive father, to ſucceed him* ab inteſtato, *much leſs therefore does the prætor admit ſuch children to poſſeſs the goods of their adoptive father contrary to his teſtament; for, by virtue of the emancipation, they ceaſe to be in the number of his children.*

Unde cognati.

§ XIII. Admonendi tamen ſumus, eos, qui in aliena familia ſunt, quive poſt mortem naturalis parentis ab adoptivo patre emancipati fuerint, inteſtato parente naturali mortuo, licet ea parte edicti, qua liberi ad bonorum poſſeſſionem vocantur, non admittantur, alia tamen parte vocari, ſcilicet, qua cognati defuncti vocantur. Ex qua ita admittuntur, ſi neque ſui hæredes liberi, neque emancipati obſtent, neque agnatus quidem ullus interveniat. Ante enim prætor liberos vocat, tam ſuos hæredes quam emancipatos, deinde legitimos hæredes, tertio proximos cognatos.

§ 13. *We muſt nevertheleſs obſerve, that, altho' thoſe, who were in an adoptive family, but have been emancipated by their adoptive father, after the deceaſe of their natural father, dying inteſtate, are not admited by that part of the edict, by which children are called to the poſſeſſion of goods, yet they are admited by another part, by which the* cognates *of the deceaſed are called to the poſſeſſion of his effects. But, by this laſt-named part of the edict, the* cognates *are only called, when there is no oppoſition from* proper heirs, *emancipated children, or* agnates: *for the prætor firſt calls the* proper heirs *with the emancipated children, then the* agnates, *and laſtly the neareſt* cognates.

Emendatio juris antiqui. De adoptivis.

§ XIV. Sed ea omnia antiquitati placuerunt: aliquam autem emendationem à noſtra conſtitutione acceperunt, quam ſuper iis perſonis expoſuimus,

mus, quæ à patribus ſuis naturalibus in adoptionem aliis dantur : invenimus etenim nonnullos caſus, in quibus filii et naturalium ſucceſſionem propter adoptionem amittebant, et, adoptione facile per emancipationem ſoluta, ad neutrius patris ſucceſſionem vocabantur. Hoc, ſolito more, corrigentes, conſtitutionem ſcripſimus, per quam definimus, quando parens naturalis filium ſuum adoptandum alii dederit, integra omnia jura ita ſervari, atque ſi in patris naturalis poteſtate permanſiſſet, nec penitus adoptio fuiſſet ſubſecuta; niſi in hoc tantummodo caſu, ut poſſit ab inteſtato ad patris adoptivi venire ſucceſſionem. Teſtamento autem ab eo facto, neque jure civili, neque prætorio, ex hæreditate ejus aliquid perſequi poteſt, neque contra tabulas bonorum poſſeſſione agnita, neque inofficioſi querela inſtituta; cum nec neceſſitas patri adoptivo imponatur, vel hæredem eum inſtituere, vel exhæredem facere, utpote nullo vinculo naturali copulatum: neque ſi ex Sabiniano ſenatus-conſulto ex tribus maribus fuerit adoptatus: nam, et in ejuſmodi caſu, neque quarta ei ſervatur, neque ulla actio ad ejus perſecutionem ei competit. Noſtra autem conſtitutione exceptus eſt is, quem parens naturalis adoptandum ſuſceperit. Utroque enim jure, tam naturali quam legitimo, in hanc perſonam concurrente, priſtina jura tali adoptioni ſervamus; quemadmodum ſi pater-familias ſeſe dederit arrogandum: quæ ſpecialiter et ſingulatim ex præfatæ conſtitutionis tenore poſſunt colligi.

§ 14. *Theſe were the rules of law, which formerly obtained; but they have received ſome emendation from the conſtitution, which we promulged, relating to thoſe perſons, who are given in adoption by their natural parents: for we have found frequent inſtances of ſons, who by adoption have loſt their ſucceſſion to their natural parents, and who, by the eaſe with which adoption is diſſolved by emancipation, have alſo loſt the right of ſucceeding to their adoptive parents. We therefore, correcting as uſual whatever is amiſs, have enacted a conſtitution, by which it is decreed, that, when a natural father hath given his ſon in adoption, all the rights of ſuch ſon ſhall nevertheleſs be preſerved intire, in the ſame manner, as if he had ſtill remained under the power of his natural father, and there had been no adoption; except only, that the perſon adopted may ſucceed to his adoptor, if he dies inteſtate. And it is alſo enacted, that, if the adoptor makes a teſtament and omits the name of his adopted ſon, ſuch ſon can neither by the civil nor the prætorian law obtain any part of the inheritance, whether he demands the poſſeſſion of the effects* contra tabulas teſtamenti, *(contrary to the letter of the teſtament,) or prefers a complaint, alleging, that the teſtament is inofficious: for an adoptor is under no obligation either to inſtitute, or diſinherit, his adopted ſon, inaſmuch as there ſubſiſts not between them any natural tye or relation. And we have farther decreed, that no adopted perſon ſhall receive any benefit from the* Sabinian ſenatus-conſultum, *by being one of three ſons: for in this caſe he ſhall neither obtain the fourth part of his adoptive father's effects, nor be intituled to any action upon that account. But all thoſe, who are adopted by their natural parents,* i. e. *by a grand-father or great-grand-father,* &c. *are excepted in our conſtitution: for, inaſmuch as ſuch perſons are united together by the concurrence both of natural and civil rights, we have thought proper to retain the old law in relation to thoſe adoptions; in the ſame man-*

ner, as when the father of a family hath given himself in arrogation. But all, which we have here observed, may be collected from the tenor of the above-mentioned constitution.

Constitutionem scripsimus.] *vid. Cod. 8. t. 48. l. 10. De adoptionibus.*

Ex Sabiniano senatus-consulto.] "Quo sena-" tus-consulto, quantum ex hoc loco conjicere " est, cautum fuit, ut, qui unum è tribus alte-" rius liberis maribus adoptasset, quartum par-" tem ei bonorum suorum relinquere cogeretur; " sicut ex constitutione *Antonini Pii* quarta " relinquenda est arrogato impuberi." *vid. Vinn.*

De descendentibus ex fœminis.

§ XV. Item vetustas, ex masculis progenitos plus diligens, solos nepotes vel neptes, qui quæve ex virili sexu descendunt, ad suorum vocabat successionem, et jure agnatorum eos anteponebat: nepotes autem, qui ex filiabus nati sunt, et pronepotes, qui ex neptibus, cognatorum loco connumerans, post agnatorum lineam eos vocabat, tam in avi vel proavi materni, quam in aviæ vel proaviæ, sive paternæ sive maternæ, successionem. Divi autem principes non passi sunt talem contra naturam injuriam sine competenti emendatione relinquere: sed, cum nepotis et pronepotis nomen commune sit utrisque, tam qui ex masculis, quam qui ex fœminis descendunt, ideo eundem gradum et ordinem successionis eis donaverunt. Sed, ut amplius aliquid sit eis, qui non solum naturæ, sed etiam veteris juris, suffragiis muniuntur, portionem nepotum vel neptum, vel deinceps, (de quibus supra diximus) paulo minuendam esse existimaverunt; ut minus tertia parte acciperent, quam mater eorum, vel avia, fuerat acceptura, vel pater eorum vel avus, paternus sive maternus, quando fœmina mortua sit, cujus de hæreditate agitur: iisque, licet soli sint, adeuntibus, agnatos minime vocabant. Et, quemadmodum lex duodecim tabularum, filio mortuo, nepotes vel neptes, pronepotes vel proneptes, in locum patris sui ad successionem avi sui vocat: ita et principalis dispositio in locum matris suæ vel aviæ eos, cum jam designata partis tertiæ diminutione, vocat. Sed nos, cum adhuc dubitatio maneret inter agnatos et memoratos nepotes, quartam partem substantiæ defuncti agnatis sibi vindicantibus ex cujusdam constitutionis auctoritate, memoratam quidem constitutionem à nostro codice segregavimus, neque inseri eam ex Theodosiano codice in eo concessimus. Nostra autem constitutione promulgata, toti juri ejus derogatum est: et sanximus, talibus nepotibus ex filia, vel pronepotibus ex nepte, vel deinceps superstitibus, adgnatos nullam partem mortui successionis sibi vindicare: ne hi, qui ex transversa linea veniunt, potiores his habeantur, qui recto jure descendunt. Quam constitutionem nostram obtinere secundum sui vigorem et tempora et nunc sancimus: ita tamen ut, quemadmodum inter filios et nepotes ex filio antiquitas statuit, non in capita, sed in stirpes, dividi hæreditatem, similiter nos, inter filios et nepotes ex filia, distributionem fieri jubeamus, vel inter omnes nepotes et neptes, et inter pronepotes vel proneptes, et alias deinceps personas; ut utraque progenies matris vel patris, aviæ vel avi, portionem sine ulla diminutione

tione conſequatur: ut, ſi forte unus vel duo ex una parte, ex altera tres aut quatuor, extent, unus aut duo dimidiam, alteri tres aut quatuor alteram dimidiam, hæreditatis habeant.

§ 15. *The antient law, ſhewing moſt favor to deſcendents from males, called thoſe grand-children only, who were ſo deſcended, to the ſucceſſion as proper heirs, and prefered them by the right of agnation: for the old law, reputing the grand-children born of daughters, and the great-grand-children born of grand-daughters, to be* cognates, *prohibited ſuch children from ſucceeding to their grand-father and great-grand-father, maternal or paternal, 'till after the line of* agnati *was exhauſted. But the emperors* Valentinian, Theodoſius, *and* Arcadius, *would not ſuffer ſuch a violence againſt nature to continue in practice; and, inaſmuch as the name of grand-child and great-grand-child is undoubtedly common, as well to deſcendents by females, as to deſcendents by males, they therefore granted an equal right of ſucceſſion to deſcendents from males and deſcendents from females. But, to the end, that thoſe perſons, who have been favored by nature, as well as by the ſuffrage of antiquity, might enjoy ſome peculiar privileges, the ſame emperors have thought it right, that the portions of grand-children, great-grand-children, and other lineal deſcendents of a female, ſhould be ſomewhat diminiſhed, and therefore they have not permited ſuch perſons to receive ſo much by a third part, as their mother or grand-mother would have received; or their father or grand-father, paternal or maternal, at the deceaſe of a female; for we now treat concerning inheritances, derived from a female: and, altho' there were only grand-children by a female to take an inheritance, yet the emperors did not call the* agnates *to the ſucceſſion. And as, upon the deceaſe of a ſon, the law of the twelve tables calls the grand-children, and great-grand-children, male and female, to repreſent their father in reſpect to the ſucceſſion of their grand-father, ſo the imperial ordinance calls them to ſucceſſion in the place of their mother or grand-mother, with the before-regulated diminution of a third part of their ſhare. But, as there ſtill remained matter of diſpute between the* agnati *and the above-named grand-children, the* agnati *claiming the fourth part of the eſtate of the deceaſed by virtue of a certain conſtitution, we have therefore not permited it to be inſerted into* our *code from that of* Theodoſius. *And we have farther taken care to alter the old law by our ordinance, having enacted, that* agnates *ſhall not be intituled to any part of the goods of the deceaſed, whileſt grand-children born of a daughter, or great-grand-children born of a grand-daughter, or any other deſcendents from a female in the right line, are living; leſt thoſe, who proceed from the tranſverſe line, ſhould be prefered to lineal deſcendents. And we now decree, that this our ordinance ſhall obtain according to it's full tenor. But as the old law ordered, that every inheritance ſhould be divided in* ſtirpes, *and not in* capita, *between the ſon of the deceaſed and his grandſons by a ſon, ſo we alſo ordain, that diſtribution ſhall be made in the ſame manner between ſons and grandſons by a daughter, and between all grandſons and grand-daughters, great-grandſons and great-grand-daughters, and all other deſcendents in a right line; ſo that the iſſue either of a mother or a father, or of a grand-mother or a grand-father, may obtain their portions without any diminution; and, if on the one part there ſhould be only one or two claimants, and on the other part three or four, that the greater number ſhall be intituled only to one half, and the leſs number to the other half of the inheritance.*

Sed ut amplius aliquid.] Nam, ſi quis decedat relicto filio, et ex filia nepote nepteve, vel pronepote pronepteve, filius quidem octo uncias habebit, nepos vero neptiſve, aut pronepos proneptiſve, ex filia præmortua, quatuor, hoc eſt, tertia parte minus quam mater eorum, vel avia, ſi ſupereſſet, haberet. Quod ſi mortua ſit fœmina relicto filio, filiave, relicto item nepote

aut pronepote ex filio filiave, jam ante defunctis, filius ille, aut filia, octo uncias habebit; nepos vero aut pronepos, sive ex filio, sive ex filia, jam ante defunctis, quatuor: hoc est, tertia parte minus quam pater eorum, aut mater, vel avus aviave, sive paterni, sive materni, accepturi essent. *Theophilus.*

Portionem nepotum vel neptum.] Descendents by a female were afterwards exempted by *Novel* 18. from suffering any defalcation, when they concurred with descendents from a male.

Unum ordinem *in omnibus ponimus nepotibus et pronepotibus, non ferentes, fœminam à masculo in talibus minui: neque enim masculus ipse in se, neque fœmina solum, ad nativitatis propagationem sufficiens est; sed sicut utrumque eorum coaptavit Deus ad generationis opus, ita etiam nos eandem utrisque servamus æquitatem.* Novel 18. c. 4. See also *Nov.* 118.

Ex cujusdam constitutionis auctoritate.] *Cod.* Theod. *de legit. hæred. l.* 4.

Nostra autem constitutione.] *vid. Cod.* 6. *de suis et legitimis liberis. t.* 55. *l.* 12. by which the *agnati* are prohibited for the future to claim the fourth, which was before due to them, in consequence of a law made by *Theodosius. vid. Cod.* Theod. *de legit. hæred.* l. 4.

Sine ulla diminutione.] "Quartæ scilicet "agnatorum; tertiæ enim deductionem tribu- "tam iis, qui etiam juris veteris suffragatione "nituntur, intactam reliquit: sed jure novissi- "mo par est omnium liberorum, in successione "ab intestato, conditio. *Vinn.* Nov. 118. *c.* 1.

TITULUS SECUNDUS.

De legitima agnatorum successione.

D. xxxviii. T. 16. C. vi. T. 58.

Secundus ordo hæredum legitimorum.

SI nemo suus hæres, vel eorum, quos inter suos hæredes prætor vel constitutiones vocant, existat, qui successionem quoquo modo amplectatur, tunc ex lege duodecim tabularum ad agnatum proximum pertinet hæreditas.

When it happens, that there are no proper heirs to succeed the deceased, nor any of those persons, whom the prætor or the constitutions would call to inherit with proper heirs, then the inheritance, by a law of the twelve tables, appertains to the nearest agnate.

Ad agnatum proximum.] "Quanquam in "recta linea gradus non curetur, in his tamen, "qui ex transverso conjunguntur, gradus præ- "rogativa omnino attenditur; sic ut proximi "remotioribus anteponantur; quare ULPIA- "NUS, *Hæreditas* (inquit) *proximo agnato*, i. e. "ei, quem nemo antecedit, defertur. *Mynsin- gerus.*

De agnatis naturalibus.

§ I. Sunt autem agnati (ut primo quoque libro tradidimus) cognati per virilis sexus personas cognatione conjuncti, quasi à patre connati. Itaque ex eodem patre nati fratres, agnati sibi sunt; qui et consanguinei vocantur: nec requiritur, an etiam eandem matrem habuerint. Item patruus fratris filio, et invicem is illi, agnatus est. Eodem numero sunt fratres patrueles, id est, qui ex duobus fratribus procreati sunt, qui etiam consobrini vocantur. Qua ratione etiam ad plures gradus agnationis pervenire poterimus. Ii etiam, qui post mortem patris nascuntur, jura consangui-

ſanguinitatis nanciſcuntur. Non tamen omnibus ſimul agnatis dat lex hæreditatem: ſed iis, qui tunc proximiore gradu ſunt, cum certum eſſe cœperit, aliquem inteſtatum deceſſiſſe.

§ 1. Agnates, *as we have obſerved in the firſt book, are thoſe, who are related or cognated by males,* (quaſi à patre cognati:) *and therefore brothers, who are the ſons of the ſame father, are* agnates *in regard to each other; they are alſo called* conſanguinei, *being of the ſame blood; but it is not required, that they ſhould have the ſame mother. An uncle is alſo agnated to his brother's ſon, and* vice verſa *the brother's ſon to his paternal uncle: and* brothers patruel, *that is, the children of brothers, who are alſo called* conſobrini, *are likewiſe reckoned* agnates. *In this manner we may enumerate many degrees of agnation; and even thoſe, who are born, after the deceaſe of their parents, obtain the rights of conſanguinity: the law nevertheleſs does not grant the right of inheritance to all the* agnati, *but to thoſe only, who are in the neareſt degree, when it becomes certain, that the deceaſed hath died inteſtate.*

" A patre connati.] Cognatio eſt nomen ge-
" nerale; ſed non tantum *generale*; plerumque
" autem ſpeciale eſt, et proprium eorum, qui
" vel per fœminei ſexus perſonas conjunguntur,
" vel capitis diminutione jura agnationis ami-
" ſerunt. *Vinn. h. t.*

Conſobrini.] " Per abuſionem ſic dicti; con-
" ſobrini enim propriè ſunt, qui ex duabus ſo-
" roribus nati ſunt; ita dicti, quaſi conſororini-
" ni. *Theoph.*

De adoptivis.

§ II. Per adoptionem quoque agnationis jus conſiſtit; veluti inter filios naturales et eos, quos pater eorum adoptavit: nec dubium eſt, quin ii improprie conſanguinei appellentur. Item, ſi quis ex cæteris agnatis tuis, veluti frater aut patruus, aut denique is, qui longiore gradu eſt, adoptaverit aliquem, agnatus inter tuos eſſe non dubitatur.

§ 2. *The right of agnation ariſes alſo from adoption; thus the natural and adopted ſons of the ſame father are* agnates; *but ſuch perſons are without doubt improperly called* conſanguinei. *Alſo if a brother, a paternal uncle, or any other, who is agnated to you in a more remote degree, ſhould adopt any perſon into his family, then ſuch adopted perſon is undoubtedly to be reckoned in the number of your* agnati.

De maſculis et fœminis.

§ III. Cæterum inter maſculos quidem agnationis jure hæreditas, etiamſi longiſſimo gradu ſint, ultro citroque capitur. Quod ad fœminas vero attinet, ita placebat, ut ipſæ, conſanguinitatis jure tantum, capiant hæreditatem, ſi ſorores ſint; ulterius non capiant. Maſculi autem ad earum hæreditates, (etiamſi longiſſimo gradu ſint,) admittantur. Qua de cauſa fratris tui, aut patrui tui filiæ, vel amitæ tuæ, hæreditas ad te pertinebat: tua vero ad illas non pertinebat. Quod ideo ita conſtitutum erat, quia commodius videbatur, ita jura conſtitui, ut plerumque hæreditates ad maſculos confluerent. Sed, quia ſane iniquum erat, in univerſum eas quaſi extraneas repelli, prætor eas ad bonorum poſſeſſionem admittit ea parte, qua proximitatis nomine bonorum poſſeſſionem pollicetur: ex qua parte ita ſcilicet admittuntur, ſi neque agnatus ullus, neque proximior cognatus

tus, interveniat. Et hæc quidem lex duodecim tabularum nullo modo introduxit: ſed, ſimplicitatem legibus amicam amplexa, ſimili modo omnes agnatos, ſive maſculos ſive fœminas, cujuſcunque gradus, ad ſimilitudinem ſuorum, invicem ad ſucceſſionem vocabat. Media autem juriſprudentia, quæ erat quidem lege duodecim tabularum junior, imperiali autem diſpoſitione anterior, ſubtilitate quadam excogitata, præfatam differentiam inducebat, et penitus eas à ſucceſſione agnatorum repellebat, omni alia ſucceſſione incognita, donec prætores, paulatim aſperitatem juris civilis corrigentes, ſive, quod deerat, implentes, humano propoſito alium ordinem ſuis edictis addiderunt; et cognationis linea, proximitatis nomine introducta, per bonorum poſſeſſionem eas adjuvabant, et pollicebantur his bonorum poſſeſſionem, quæ *unde cognati* appellatur. Nos vero, legem duodecim tabularum ſequentes, et ejus veſtigia hac in parte conſervantes, laudamus quidem prætores ſuæ humanitatis, non tamen eos in plenum huic cauſæ mederi invenimus. Quare etenim, uno eodemque gradu naturali concurrente, et agnationis titulis tam in maſculis quam in fœminis æqua lance conſtitutis, maſculis quidem dabatur ad ſucceſſionem venire omnium agnatorum, ex agnatis autem mulieribus nulli penitus, niſi ſoli ſorori, agnatorum ſucceſſionem patebat aditus? Ideo nos, in plenum omnia reducentes, et ad jus duodecim tabularum eandem diſpoſitionem exæquantes, noſtra conſtitutione ſancimus, omnes legitimas perſonas, id eſt, per virilem ſexum deſcendentes (ſive maſculini generis ſive fœminini ſint) ſimili modo ad jura ſucceſſionis legitimæ ab inteſtato vocari, ſecundum ſui gradus prærogativam; nec ideo excludendas, quia conſanguinitatis jura, ſicut germanæ, non habent.

§ 3. *Succeſſion among males proceeds according to the right of agnation, altho' they are in the moſt diſtant degree. But it hath pleaſed the antient lawyers, that females ſhould only inherit by conſanguinity, if they are ſiſters; and not in a more remote degree; tho' males might be admited in the moſt diſtant degree to inherit females: thus, in caſe of death, the inheritance of your brother's daughter, or of the daughter of your paternal uncle or aunt, would appertain to you; but your inheritance would not appertain to them. And this was ſo determined, becauſe it ſeemed expedient for the benefit of ſociety, that inheritances ſhould for the moſt part fall into the poſſeſſion of males. But, inaſmuch as it was extremely unjuſt, that females ſhould be thus almoſt wholly excluded as ſtrangers, the prætor admited them to the poſſeſſion of goods in that part of his edict, in which he gives the poſſeſſion of goods on account of proximity: yet they are only admited upon condition, that there is no* agnate, *or nearer* cognate. *But the law of the twelve tables did not introduce theſe diſpoſitions; for that law, according to the plainneſs and ſimplicity, which are agreeable to all laws, called the* agnates *of either ſex, or any degree, to ſucceſſion, in the ſame manner as it admited* proper *heirs. But the middle law, which was poſterior to the law of the twelve tables, and prior to the imperial conſtitutions, ſubtilly introduced the before mentioned diſtinction, and intirely repelled females from the ſucceſſion of* agnates, *no other method of ſucceſſion being known, till the prætors, correcting by degrees the aſperity of the civil law, or ſupplying what was deficient, added in their edicts a new order of ſucceſſion, being induced to it by a motive of humanity; and, by introducing the line of cognation on account*

account of proximity, they thus aſſiſted the females, and gave them the poſſeſſion of goods, which is called unde cognati. *But we, altho' we have adhered to the law of the twelve tables, and ſtrictly maintained it in regard to females, muſt yet commend the humanity of the prætors, tho' they have not afforded a full remedy in the preſent caſe. But, ſince the ſame natural degree of relation, and the ſame title of agnation appertains as well to females as to males, what reaſon can be aſſigned, that males ſhould be permited to ſucceed all their* agnati, *and that no means of ſucceſſion ſhould be open to any female* agnate, *except a ſiſter? We therefore, reducing all things to an equality, and making our diſpoſition conformable to the laws of the twelve tables, have by our conſtitution ordained, that all legitime perſons, that is, deſcendents from males, whether male or female, ſhall be equally called to the rights of ſucceſſion* ab inteſtato *according to the prerogative of their degree, and be by no means excluded, altho' they poſſeſs not the rights of conſanguinity in ſo near a degree as ſiſters.*

Noſtra conſtitutione ſancimus.] *vid. Cod. 6. t. 58. l. pen. de legit. hæredibus.*

De filiis ſororum.

§ IV. Hoc etiam addendum noſtræ conſtitutioni exiſtimavimus, ut transferatur unus tantummodo gradus à jure cognationis in legitimam ſucceſſionem; ut non ſolum fratris filius et filia (ſecundum quod jam definivimus) ad ſucceſſionem patrui ſui vocentur, ſed etiam germanæ conſanguineæ vel ſororis uterinæ filius et filia ſoli, et non deinceps perſonæ, una cum his ad jura avunculi ſui perveniant: et, mortuo eo, qui patruus quidem eſt ſui fratris filiis, avunculus autem ſororis ſuæ ſoboli, ſimili modo ab utroque latere ſuccedant, tanquam ſi omnes ex maſculis deſcendentes legitimo jure veniant; ſcilicet ubi frater et ſoror ſuperſtites non ſunt. His etenim perſonis præcedentibus et ſucceſſionem admittentibus, cæteri gradus remanent penitus ſemoti, videlicet hæreditate non in ſtirpes, ſed in capita, dividenda.

§ 4. *We have farther thought it neceſſary to add a clauſe to our conſtitution, by which one degree is transfered from the line of cognation to the line of legitime ſucceſſion, i. e. of* agnation: *ſo that not only the ſon and daughter of a brother (according to our former definition of* agnates*) ſhall be called to the ſucceſſion of their paternal uncle, but the ſon or daughter of a ſiſter, who is either by the ſame father or by the ſame mother, may alſo be admited with* agnates *to the ſucceſſion of their maternal uncle; but no one of the deſcendents of the ſon or daughter of a ſiſter is by any means to be admited. And, when a perſon dies, who at his deceaſe was both a paternal and maternal uncle, that is, who had nephews or neices living both by a brother and by a ſiſter, then ſuch children ſucceed in the ſame manner, as if they were all deſcendents from males, when the deceaſed leaves no brother, or ſiſters: but, if there are brothers or ſiſters, and they accept the ſucceſſion, all others of a more remote degree are excluded. But it muſt be obſerved in relation to the children of brothers and ſiſters, that inheritances are not to be divided among them* in ſtripes, *but in* capita.

Non in ſtirpes ſed in capita.] It appears from this ſection, that as yet brother's children were not allowed to repreſent their parents: for inſtance; if *Sempronius* had died inteſtate, leaving a brother, and children by two other brothers deceaſed; then, if the ſurviving brother had

had accepted the ſucceſſion, the children of the deceaſed brothers, (*i. e.* the nephews of *Sempronius,*) would have been intirely ouſted; but, if the ſurviving brother of *Sempronius* had declined the inheritance, the children of the two deceaſed brothers would have been intituled to a diſtributive ſhare of their uncle's eſtate *per capita*, that is, by poll; becauſe they would then take *ſuo quiſque jure* each in his own right and not by repreſentation. But by *Nov.* 118. *cap.* 3. and *Nov.* 127. *cap.* 1. brothers and ſiſters children are allowed to repreſent their parents; and yet this repreſentation is only permited by the civil law to prevent excluſion, when the party deceaſed leaves a brother, and nephews by another brother; and then the uncle and nephews take *per ſtirpes*; for, when there are only nephews, there is no repreſentation; and the diſtribution of the eſtate is conſequently made *per capita*, each perſon taking in his own right. This is alſo the certain rule of diſtribution in *England* in the caſe of collaterals. *vid.* 22, 23. *Car.* 2. Bacon's *abr. verb.* executors *and* adminiſtrators. *Abridgment of caſ. in eq. pag.* 249. *Walch. v. Walch.*

De proximis vel remotis.

§ V. Si plures ſint gradus agnatorum, aperte lex duodecim tabularum proximum vocat. Itaque, ſi (verbi gratia) ſint defuncti frater, et alterius fratris filius, aut patruus, frater potior habetur. Et, quamvis ſingulari numero uſa, lex duodecim tabularum proximum vocet, tamen dubium non eſt, quin, ſi plures ſint ejuſdem gradus, omnes admittuntur. Nam et proprie proximus ex pluribus gradibus intelligitur: et tamen non dubium eſt, quin, licet unus ſit gradus agnatorum, pertineat ad eos hæreditas.

§ 5. *When there are many degrees of* agnates, *the law of the twelve tables calls thoſe, who are in the neareſt degree: if therefore, for example, there is a brother of the deceaſed, and a ſon of another brother, or a paternal uncle, the brother is prefered. But, altho' the law of the twelve tables calls the neareſt* agnate *in the ſingular number, yet it is not to be doubted, but that, if there are many, in the ſame degree, they ought all to be admited. And, altho' properly the neareſt degree muſt be underſtood to denote the neareſt degree of many, yet, if there is but one degree of* agnates, *the inheritance muſt undoubtedly appertain to thoſe, who are in that degree.*

Quo tempore proximitas ſpectatur.

§ VI. Proximus autem, ſi quidem nullo teſtamento facto quiſquam deceſſerit, per hoc tempus requiritur, quo mortuus eſt is, cujus de hæreditate quæritur: quod ſi facto teſtamento quiſquam deceſſerit, per hoc tempus requiritur, quo certum eſſe cœperit, nullum ex teſtamento hæredem extiturum: tunc enim proprie quiſque inteſtatus deceſſiſſe intelligitur: quod quidem aliquando longo tempore declaratur. In quo ſpatio temporis ſæpe accidit, ut, proximiore mortuo, proximus eſſe incipiat, qui moriente teſtatore non erat proximus.

§ 6. *When a man dies and leaves no teſtament, then that perſon is eſteemed his proximate kinſman, who was the neareſt of kin at the deceaſe of the inteſtate. But, when the deceaſed hath actually made a teſtament, then that perſon is eſteemed his neareſt of kin, who was ſo at the time, when it became certain, that the teſtamentary heir had declined the inheritance; for, till then, a man, who hath made a teſtament, can not be ſaid to have died inteſtate: and thus an inteſtacy does not ſometimes become evident, till after a long time; in which ſpace, the proximate kinſman being dead,*

dead, it often happens, that he becomes the neareſt of kin, who was not ſo at the death of the teſtator.

De ſucceſſorio edicto.

§ VII. Placebat autem, in eo genere percipiendarum hæreditatum ſucceſſionem non eſſe: id eſt, ut quamvis proximus, qui ſecundum ea, quæ diximus, vocatur ad hæreditatem, aut ſpreverit hæreditatem, aut, antequam adeat, deceſſerit, nihilo magis legitimo jure ſequentes admittantur. Quod iterum prætores, imperfecto jure corrigentes, non in totum ſine adminiculo relinquebant, ſed ex cognatorum ordine eos vocabant, utpote agnationis jure eis recluſo. Sed nos, nihil perfectiſſimo juri deeſſe cupientes, noſtra conſtitutione, quam de jure patronatus humanitate ſuggerente protulimus, ſancimus, ſucceſſionem in agnatorum hæreditatibus non eſſe eis denegandam: cum ſatis abſurdum erat, quod cognatis à prætore apertum eſt, hoc agnatis eſſe recluſum; maxime cum in onere quidem tutelarum et primo gradu deficiente ſequens ſuccedit; et, quod in onere obtinebat, non erat in lucro permiſſum.

§ 7. *But it hath obtained as law, that there ſhould be no ſucceſſion among* agnates; *ſo that, if the neareſt* agnate *is called to an inheritance, and hath either refuſed the heirſhip, or been prevented by death from entering upon it, his own legitime heir would not be admited to ſucceed him. But this the prætors have in ſome meaſure corrected, and have not left the* agnates *of a deceaſed perſon wholly without aſſiſtence, but have ordered, that they ſhould be called to the inheritance as* cognates, *becauſe they were debared from the rights of agnation. But we, being earneſtly deſirous to render our law as perfect and complete as poſſible, have ordained by our conſtitution, which, induced by humanity, we publiſhed concerning the right of patronage, "that legitime ſucceſſion ſhould not be denied to* agnates *in the inheritances of* agnates:" *for it was ſufficiently abſurd, that a right, which by means of the prætor was open to* cognates, *ſhould be ſhut up and denied to* agnates: *but it was more abundantly abſurd, that in tutelages the ſecond degree of* agnates *ſhould ſucceed upon failure of the firſt; and that the ſame law, which obtained in that, which was onerous, ſhould not alſo obtain in that, which was lucrative.*

Succeſſionem non eſſe.] *Veluti; deceſſit aliquis inteſtatus, extante fratre, extante et patruo; frater vocabatur, nimirum ut proximus; ſi igitur contingat, ut frater, aut, antequam adeat, decedat, aut hæreditatem repudiet, patruus aut agnatus venire non poterit, propterea quod lex duodecim tabularum ſucceſſionem neſciat; hæreditas igitur ad fiſcum deferebatur.* Theoph. *h. l.*

Noſtra conſtitutione.] This conſtitution is not to be found; nor would it be of uſe, if it was ſtill extant, ſince the 118th *Novel* hath deſtroyed all diſtinction between *agnates* and *cognates*, and put them upon an equality.

De legitima parentum ſucceſſione.

§ VIII. Ad legitimam ſucceſſionem nihilominus vocatur etiam parens, qui contracta fiducia filium vel filiam, nepotem vel neptem, ac deinceps, emancipat. Quod ex noſtra conſtitutione omnino inducitur, ut emancipationes liberorum ſemper videantur, quaſi contracta fiducia, fieri: cum apud veteres non aliter hoc obtinebat, niſi ſpecialiter contracta fiducia parens manumiſiſſet.

§ 8. *A parent, who hath emancipated a ſon or a daughter, a grandſon or a grand-daughter, or any other of his lineal deſcendents under a fiduciary contract, is admited to their legitime ſucceſſion. But it is now effected by our conſtitution, that every emancipation ſhall for the future be always regarded, as if it had been made under ſuch a contract: altho' among the antients the parent was never called to the legitime ſucceſſion of his children, unleſs he had actually emancipated them under a fiduciary contract.*

Ex noſtra conſtitutione.] *Cod.* 8. *t.* 49. *l.* 6. *de emancipationibus liberorum.* See alſo *Book* the 1ſt, *t.* 12. *l.* 6. But *Heineccius* is of opinion, that the compilers of the inſtitutes refer in this place to ſome other conſtitution, which is not now extant. *Videntur compoſitores hoc loco ad aliam reſpexiſſe conſtitutionem, quæ cum codice Juſtinianeo intercidit, qua imperator ſanxerat, ut pactum fiduciæ ſemper interpoſitum eſſe fingeretur, etiamſi expreſſe interpoſitum non eſſet. Sed hac conſtitutione poſt legem ultimam Cod. de emanc. lib. non amplius opus fuit; unde et omiſſa fuit in codice repetitæ prælectionis. Cæterum omnino eatenus excuſari nequeunt compoſitores, quod, immemores novæ iſtius conſtitutionis, vetuſtioris et abolitæ fecerunt mentionem.* Hein. *h. l.*

TITULUS TERTIUS.

De ſenatus-conſulto Tertulliano.

D. xxxviii. T. 17. C. vi. T. 56.

De lege duodecim tabularum et jure prætorio.

LEX duodecim tabularum ita ſtricto jure utebatur, et præponebat maſculorum progeniem; et eos, qui per fœminini ſexus neceſſitudinem ſibi junguntur, adeo expellebat, ut ne quidem inter matrem et filium filiamve ultro citroque hæreditatis capiendæ jus daret: niſi quod prætores ex proximitate cognatorum eas perſonas ad ſucceſſionem bonorum, poſſeſſione *unde cognati* accommodata, vocabant.

Such was the rigor of the law of the twelve tables, that it prefered the iſſue by males, and excluded thoſe, who were related by the female line, ſo that the right of ſucceſſion was not permited to take place reciprocally between a mother and her ſon, or a mother and her daughter. But the prætors, on account of the proximity of cognation, admited thoſe, who were related by the female line, to the ſucceſſion, giving them the poſſeſſion of goods, called unde cognati.

De conſtitutione Divi Claudii.

§ 1. Sed hæ juris anguſtiæ poſtea emendatæ ſunt. Et primus quidem Divus Claudius matri ad ſolatium liberorum amiſſorum legitimam eorum detulit hæreditatem.

§ 1. *But thoſe narrow limits of the law were afterwards inlarged by the emperor* Claudius, *who firſt gave the legitime inheritance of deceaſed children to their mothers, in aſſuaſion of their grief for ſo great a loſs.*

Liberorum amiſſorum.] It is probable, that this indulgence extended only to thoſe mothers, whoſe children died in battle, or fell by the hand of the enemy. "*Proculdubio autem,* (ſays *Heineccius*) *hoc privilegium à Claudio non tam omnibus fœminis, quam quibuſdam ſpeciali beneficio, conceſſum eſt.*

Ad

Ad Senatus-conſultum Tertullianum. De jure liberorum.

§ II. Poſtea autem ſenatus-conſulto Tertulliano, quod Divi Adriani temporibus factum eſt, pleniſſime de triſti ſucceſſione matri, non etiam aviæ, deferenda cautum eſt: ut mater ingenua trium liberorum jus habens, libertina quatuor, ad bona filiorum filiarumve admittatur inteſtato mortuorum, licet in poteſtate parentis ſit: ut ſcilicet, cum alieno juri ſubjecta eſt, juſſu ejus adeat hæreditatem, cujus juri ſubjecta eſt.

§ 2. *But afterwards by the* Tertullian ſenatus-conſultum, *made in the reign of* Adrian, *the emperor, the fulleſt care was taken, that the ſucceſſion of children ſhould paſs to their mother, though not to their grand-mother: ſo that a mother, who is born of free parents, and has the right of three children, and alſo a* libertine *or freed-woman, who has the right of four children, may be admited, altho' they are under the power of a parent, to the goods of their ſons or daughters, dying inteſtate. But, when a mother is under power, it is required, that ſhe ſhould not enter upon the inheritance of her children, but at the command of him, to whom ſhe is ſubject.*

Divi Adriani temporibus.] *i. e.* about an hundred years after the conſtitution of *Claudius*: for *Tiberius Claudius Cæſar* began to reign in the year of *Chriſt* 16, and *Adrian* did not begin his reign 'till the year of *Chriſt* 120. *Mynſinger.*

Non etiam aviæ.] The *Tertullian* decree probably ſtopped here out of reverence to the old law; but *Juſtinian* proceded farther, by admiting the grandmother and other aſcendents to the ſucceſſion. *vid. Nov.* 118. *cap.* 2.

Qui præferuntur matri, vel cum ea admittuntur.

§ III. Præferuntur autem matri liberi defuncti, qui ſui ſunt, quive ſuorum loco ſunt, ſive primi gradus, ſive ulterioris. Sed et filiæ ſuæ mortuæ filius vel filia præponitur ex conſtitutionibus matri defunctæ, id eſt, aviæ ſuæ. Pater vero utriuſque, non etiam avus et proavus, matri anteponitur; ſcilicet cum inter eos ſolos de hæreditate agitur. Frater autem conſanguineus tam filii, quam filiæ, excludebat matrem; ſoror autem conſanguinea pariter cum matre admittebatur. Sed, ſi fuerant frater et ſoror conſanguinei, et mater liberis onerata, frater quidem matrem excludebat; communis autem erat hæreditas ex æquis partibus fratribus et ſororibus.

§ 3. *But, when a deceaſed ſon leaves children, who are proper heirs, or in the place of proper heirs, either in the firſt or an inferior degree, they are prefered to the mother of ſuch deceaſed ſon. And the ſon, or daughter, of a deceaſed daughter is alſo prefered by the conſtitutions to the mother of the deceaſed daughter; i. e. to their grand-mother. Alſo the father of a ſon, or daughter, is prefered to the mother; but a grand-father or great-grand-father is not prefered to the mother, when the inheritance is contended for by theſe only without the father. Alſo the conſanguine brother either of a ſon or a daughter excluded the mother; but a conſanguine ſiſter was admited equally with her mother. But, if there had been both a brother and a ſiſter of the ſame blood with the deceaſed, the brother of the deceaſed excluded his mother, altho' ſhe was honored with the privilege of thoſe, who have children: But the inheritance, in this caſe, was always divided in equal parts between brothers and ſiſters.*

Suorum loco ſunt.] Emancipated children by the prætorian law, and by the conſtitutions grand-children and great-grand-children by a daughter, are numbered *in loco ſuorum*, i.e. in the place of proper heirs. *vide t.* 1. *ſect.* 15. *of this book.*

Ex conſtitutionibus.] *Si, matre ſuperſtite, filius vel filia, qui quæve moritur, filios dereliquerit, omnimodo patri ſuo, matrive ſuæ, ipſo jure ſuccedant, quod ſine dubio et de pronepotibus obſervandum eſſe cenſemus.* *Cod.* 6. *t.* 54. *l.* 11. *Cod.* 6. *t.* 57. *l.* 4. ad ſenatus-conſultum Orficianum.

Frater autem conſanguineus.] "Porro, cum fra-
" tres duntaxat et ſorores hoc loco matri obji-
" ciantur, exiſtimandum eſt, cæteris à latere
" venientibus, ſive *agnatis* ſive *cognatis*, matrem
" præferri. Sed et, quia conſanguineorum tan-
" tum mentio fit, credibile eſt, fratres et ſorores
" uterinos ſenatus-conſulto fuiſſe excluſos: cæ-
" terum *Juſtinianus* hos etiam cum matre ad-
" miſit. *vid. ſect.* 5. Novella autem 118 to-
" tum hoc jus mutatum eſt." *Vinn.*

Jus novum de jure liberorum ſublato.

§ IV. Sed nos conſtitutione, quam in codice, noſtro nomine decorato, poſuimus, matri ſubveniendum eſſe exiſtimavimus, reſpicientes ad naturam, et puerperium, et periculum, et ſæpe mortem ex hoc caſu matribus illatam. Ideoque impium eſſe credidimus, caſum fortuitum in ejus admitti detrimentum. Si enim ingenua ter, vel libertina quater, non pepererit, immerito defraudabatur ſucceſſione ſuorum liberorum. Quid enim peccavit, ſi non plures, ſed paucos, peperit? Et dedimus jus legitimum plenum matribus, ſive ingenuis ſive libertinis, etſi non ter enixæ fuerint vel quater, ſed eum tantum vel eam, qui quæve morte intercepti ſunt, ut ſic vocentur in liberorum ſuorum legitimam ſucceſſionem.

§ 4. *But by a conſtitution, which we have inſerted in the code, and honored with our name, we have thought proper, that mothers ſhould be favored in regard to the law of nature, on account of their pains in child-bearing, their great danger, and death itſelf, which they often ſuffer; we therefore have eſteemed it to be highly unjuſt, that the law ſhould make that detrimental, which is in it's nature merely fortuitous; for, if a married woman, who is free-born, does not bring forth three children, or if a freed-woman does not become the mother of four children, can ſuch perſons, for that reaſon only, be with juſtice deprived of the ſucceſſion of their children? for how can a failure of this nature be imputed to them, as a crime? We therefore, not regarding any fixed number of children, have given a full right to every mother, whether ingenuous or a freed-woman, of being called to the legitime ſucceſſion of her child or children deceaſed, whether male or female.*

Sed nos conſtitutione.] *Cod.* 8. *de jure liberorum. t.* 59. *l.* 2.

Quibus mater præponitur, et quibuſcum admittitur.

§ V. Sed, cum antea conſtitutiones, jura legitimæ ſucceſſionis perſcrutantes, partim matrem adjuvabant, partim eam prægravabant, nec in ſolidum eam vocabant, ſed, in quibuſdam caſibus tertiam ei partem abſtrahentes, certis legitimis dabant perſonis, in aliis autem contrarium faciebant, nobis viſum eſt, recta et ſimplici via matrem omnibus perſonis legitimis anteponi, et ſine ulla diminutione filiorum ſuorum ſucceſſionem accipere: excepta fratris et ſororis perſona, (ſive conſanguinei ſint, ſive ſola cognationis jura habentes,) ut, quemadmodum eam toti alii ordini legitimo præpoſuimus, ita omnes fratres et ſorores, (ſive legitimi ſint, ſive non,)

ad

ad capiendas hæreditates ſimul vocemus: ita tamen ut, ſiquidem ſolæ ſorores agnatæ vel cognatæ et mater defuncti vel defunctæ ſuperſint, dimidiam quidem mater, alteram vero dimidiam partem omnes ſorores habeant. Si vero, matre ſuperſtite, et fratre vel fratribus ſolis, vel etiam cum ſororibus, ſive legitima ſive ſola cognationis jura habentibus, inteſtatus quis vel inteſtata moriatur, in capita ejus diſtribuatur hæreditas.

§ 5. *But, in examining the conſtitutions of former emperors, relating to the right of ſucceſſion, we obſerved, that theſe conſtitutions were partly favorable to mothers and partly grievous; not always calling them to the intire inheritance of their children, but in ſome caſes depriving them of a third, which was given to certain legitime perſons; and in other caſes, doing the contrary; i. e. allowing the mother a third only. It hath therefore ſeemed right to us, that mothers ſhould receive the ſucceſſion of their children without any diminution, and that they ſhould be excluſively prefered before all legitime perſons, except the brothers and ſiſters of the deceaſed, whether they are* conſanguine, *or only* cognate: *But, as we have prefered the mother to all other legitime perſons, we are willing to call all brothers and ſiſters, legitime or otherwiſe, to the inheritance together with the mother: yet in ſuch manner, that, if only the ſiſters,* agnate *or* cognate, *and the mother of the deceaſed ſurvive, the mother ſhall have one half of the effects, and the ſiſters the other. But, if a mother ſurvives, and alſo a brother or brothers, or brothers and ſiſters, whether* legitime *or* cognate, *then the inheritance of the inteſtate ſon or daughter muſt be diſtributed* in capita, *i. e. muſt be divided into equal ſhares.*

Cum antea conſtitutiones.] *vid. ll.* 1, 2, *et penult. Cod.* Theod. *de legit. hæred.*

Partim matrem.] Exempli gratia; " ſi con-
" tigiſſet, ut quis decederet relinquens matrem,
" jure liberorum cohoneſtatam, ſupereſſet au-
" tem et patruus, qui eſt legitimus, aut patrui
" filius, mater octo capiebat uncias, ſive beſſem
" hæreditatis; patruus autem aut ejus filius tri-
" entem; hoc eſt, quatuor uncias. Quod ſi ex
" contrario jus liberorum mater non habuiſſet,
" tunc patruus aut filius ejus beſſem hæreditatis
" capiebat, at mater trientem ſolum." *Theoph. h. t.*

Ita tamen, &c.] " Quæ ſequuntur pertinent ad
" modum ſuccedendi, ſive rationem diſtribuen-
" dæ hæreditatis inter matrem defuncti, ejuſque
" fratres et ſorores. Conſtituit autem impera-
" tor, ut, ſi cum matre concurrant ſorores ſo-
" læ, ſive conſanguineæ ſive uterinæ, duo ſe-
" miſſes fiant, quorum unum mater, alterum
" ſorores capiant; ſin fratres, ſive ſoli, ſive
" etiam cum ſororibus, in capita hæreditas di-
" vidatur, totque partes fiant, quot ſunt perſo-
" næ ſuccedentium. *Cod.* 6. *t* 56. *l.* 7. Hæc
" iterum mutata ſunt *Novel.* 118. qua fratres et
" ſorores omnes, ex uno tantum latere defuncto
" conjuncti, tam à matre, quam a fratribus
" utrinque conjunctis, excluduntur; mater cum
" his ex æquis partibus ſuccedit." *Vinn. h. l.*
But in *England* the civil law takes place almoſt in the ſame manner, as it prevailed before the novel conſtitution: for brothers and ſiſters by the half blood take equally with brothers and ſiſters by the whole blood; ſo that, if a man, whoſe father is dead, dies inteſtate, and is ſurvived by a mother and by brothers and ſiſters, or by brothers only, or ſiſters only, then the mother and the brothers and ſiſters will all be intituled to take an equal ſhare, *per capita*, whether ſuch brothers and ſiſters were related to the deceaſed by the whole blood, or by the half blood only. 1 *Mod.* 209. 1 *Jac.* 2. *cap.* 17.

De tutore liberis petendo.

§ VI. Sed, quemadmodum nos matribus proſpeximus, ita eas oportet ſuæ ſoboli conſulere; ſcituris eis, quod, ſi tutores liberis non petierint, vel in locum remoti vel excuſati intra annum petere neglexerint, ab eorum impuberum morientium ſucceſſione merito repellentur.

§ 6.

§ 6. *As we have taken a particular care of the intereſt of mothers, it behoves them in return, to conſult the welfare of their children. Be it known therefore, that, if a mother ſhall neglect, during the ſpace of a whole year, to demand a tutor for her children, or ſhall neglect to require a new tutor in the place of a former, who hath either been removed, or excuſed, ſhe will be deſervedly repelled from the ſucceſſion of ſuch children, if they die within puberty.*

De vulgo quæſitis.

§ VII. Licet autem vulgo quæſitus ſit filius filiave, poteſt tamen ad bona ejus mater ex Tertulliano ſenatus-conſulto admitti.

§ 7. *Altho' a ſon or a daughter is of ſpurious birth, yet the mother, by the* Tertullian ſenatus-conſultum, *may be admited to ſucceed to the goods of either.*

TITULUS QUARTUS.

De ſenatus-conſulto Orficiano.

D. xxxviii. T. 17. C. vi. T. 57.

Origo et ſumma ſenatus-conſulti.

PER contrarium autem liberi ad bona matrum inteſtatarum admittuntur ex ſenatus-conſulto Orficiano, quod, Orficio et Rufo conſulibus, effectum eſt Divi Marci temporibus: et data eſt tam filio, quam filiæ, legitima hæreditas, etiamſi alieno juri ſubjecti ſint, et præferuntur conſanguineis et agnatis defunctæ matris.

On the contrary children are reciprocally admited to the goods of their inteſtate mothers, by the Orfician ſenatus-conſultum, *which was enacted in the conſulate of* Orficius *and* Rufus, *in the time of the emperor* Marcus Antoninus; *and, by this decree, the legitime inheritance is given both to ſons and daughters, altho' they are under power; and they are alſo prefered to the conſanguine brothers, and to the* agnates, *of their deceaſed mother.*

Per contrarium.] "Lege duodecim tabularum, nec mater liberis nec liberi matri ab inteſtato ſuccedebant; nam duo duntaxat genera lex agnoſcebat, ſuos hæredes et agnatos, cujuſmodi nec mater liberis, nec illi matri ſunt. Cæterum, cum placitum eſſet hoc dare naturali conjunctioni, ut mater vocaretur ad legitimam ſucceſſionem filii et filiæ, æquum erat, ut retro tantundem etiam concederetur liberis, ut ſcilicet et hi viciſſim jus legitimæ ſucceſſionis conſequerentur in bonis matris: cum adeo liberorum conditio in cauſa ſucceſſionis etiam potior eſſe debeat, propter naturæ ſimul et parentum commune votum. Id vero effectum eſt ſenatus-conſulto Orficiano viginti ferme annis poſtea, quam matri legitima hæreditas delata fuerat ſenatus-conſulto Tertulliano, ut ex Faſtis colligitur. Cur matri tanto tempore ante conſultum fuerit, quam liberis, cauſam ignorare me fateor. *Vinn.* Maxime autem probabilis eſt ratio, quam reddit *Schultingius*, quod mater, ſi vellet, pietatis officio per teſtamentum poſſet ſatisfacere; id quod per ætatem liberis ſæpe haud licuerit."

Orficio et Rufo Coſs.] Anno ab urbe condita 930, qui vigeſimus annus eſt à conſulatu *Flavii Tertulli*, à quo ſenatus-conſultum Tertullianum.

Præferuntur conſanguineis.] Pleniore jure vocantur filius et filia ad hæreditatem matris ex Orficiano, quam mater ad illorum hæreditatem ex Tertulliano. *vide ſect. 3. ſupra tit. prox.*

§. 1.

De nepote et nepte.

§ I. Sed, cum ex hoc ſenatus-conſulto nepotes et neptes ad aviæ ſucceſſionem legitimo jure non vocarentur, poſtea hoc conſtitutionibus principalibus emendatum eſt, ut, ad ſimilitudinem filiorum filiarumque, et nepotes et neptes vocentur.

§ 1. *But, ſince grandſons and grand-daughters were not called by the* ſenatus-conſultum *to the legitime ſucceſſion of their grand-mother, the omiſſion was afterwards ſupplied, by the imperial conſtitutions; ſo that grandſons and grand-daughters were called to inherit, as well as ſons and daughters.*

Conſtitutionibus principalibus.] The *Tertullian* decree confered upon mothers the right of legitime ſucceſſion to their children; and the *Orfician* decree gave children the ſame right in regard to their mothers: but neither of theſe decrees went farther out of reverence to the old law; ſo that hitherto grand-mothers were called to the ſucceſſion of their grand-children, and grand-children to the ſucceſſion of their grand-mothers, by the indulgence of the prætor only; i. e. *per bonorum poſſeſſionem* UNDE COGNATI, and in default of *agnates*. ff. 38. *t*. 8. But the emperors, *Valentinian*, *Theodoſius*, and *Arcadius*, called grandſons and grand-daughters to the ſucceſſion of their grand-mothers; prohibiting them nevertheleſs to take more than two thirds of that ſum, to which their father or mother would have been intituled. *l*. 4. *Cod. Theod. de legit. hæred.* But the emperor *Juſtinian*, by his 118th *Novel*, *cap*. 1, makes the condition of all children equal, when they ſucceed their parents upon an inteſtacy. And, by the 2d chapter of the ſame *Novel*, the emperor calls alſo the grand-mother to the ſucceſſion of her grand-children.

De capitis diminutione.

§ II. Sciendum autem eſt, hujuſmodi ſucceſſiones, quæ ex Tertulliano et Orficiano ſenatus-conſultis deferuntur, capitis diminutione non perimi, propter illam regulam, qua novæ hæreditates legitimæ capitis diminutione non pereunt; ſed illæ ſolæ, quæ ex lege duodecim tabularum deferuntur.

§ 2. *But it muſt be obſerved, that thoſe ſucceſſions, which proceed from the* Tertullian *and* Orfician ſenatus-conſulta, *are not extinguiſhed by diminution. For it is an eſtabliſhed rule, that new legitime inheritances are not deſtroyed by diminution; but that it affects only thoſe inheritances, which proceed from the law of the twelve tables.*

De vulgo quæſitis.

§ III. Noviſſime ſciendum eſt, etiam illos liberos, qui vulgo quæſiti ſunt, ad matris hæreditatem ex ſenatus-conſulto admitti.

§ 3. *It is laſtly to be noted, that even illegitimate children are admited by the* Orfician ſenatus-conſultum *to the inheritance of their mother.*

Qui vulgo quæſiti ſunt.] The *vulgo quæſiti* are thoſe, whom the law emphatically calls *ſpurious*, their father being incertain and not known; but the mother, who is always certain, is allowed to ſucceed even her *ſpurious* iſſue; which is not permited in *England*, where a baſtard is reckoned as a *terminus à quo*, and the firſt of his family; he can therefore have no heir but of his body, and is deemed in law to have no conſanguine relations, except his children; yet this muſt be underſtood, as to civil purpoſes; for, as to moral purpoſes, his natural relation to aſcendents and collaterals is regarded by the law, which will not ſuffer ſuch a perſon to marry his mother, or his baſe ſiſter. 3 *Salk*. 66, 67.

Ad matris hæreditatem.] The *vulgo quæſiti*, or *ſpurious* children, are allowed to ſucceed their mother, unleſs ſhe is a perſon of illuſtrious birth, having lawful children; for, if ſhe has no lawful children, her illegitimate iſſue will ſucceed her

her. *Cod.* 6. *t.* 57. *l.* 5. And in general *ſpurious* children will ſucceed their mother equally with thoſe, who are legitimate: and, even if *ſpurious* children are prætermited in the teſtament of their mother, they may by the civil law complain of that teſtament as inofficious and undutiful. *De inofficioſo teſtamento matris ſpurii quoque filii dicere poſſunt.* ff. 5. t. 2. *l.* 29. Yet ſpurious children are not in like manner intituled to ſucceed to the poſſeſſions of their father, whom the law does not regard, but ſuppoſes to be unknown. Children nevertheleſs, who are born of a concubine, when their father is certain, and dies without a wife or lawful iſſue, are intituled, together with their mother, to the ſixth part of their father's inheritance, which is to be divided among them *per capita*, or by poll. *Nov.* 18. *t.* 5. *cap.* 5. But baſtards, begotten in adultery or inceſt, are wholly incapable of ſucceeding to their father's or mother's eſtate. *Nov.* 89. *cap.* 15. But in *England* baſtards are not diſtinguiſhed into ſpecies, being all regarded in the ſame light, and eſteemed equally incapable of ſucceeding to the perſonal eſtate of their inteſtate parents, being feigned to be *nullius filii*; ſo that no illegitimate child can take any part either of his father's or mother's eſtate upon an inteſtacy; neither can an ordinary or eccleſiaſtical judge grant the adminiſtration of an inteſtate's eſtate to the baſe-born iſſue of that inteſtate. *Swinb.* 373. Yet any perſon, altho' he hath legitimate children, may, by the law of *England*, bequeath any part, or the whole of his eſtate without controul, and may conſequently benefit his illegitimate children, or their mother, in what manner he pleaſes; for ſuch perſons are not incapable of taking by purchaſe, gift, or teſtament: and in this reſpect the law of *England* is more favorable to natural children, than the civil law; for, by that law, a man, who had lawful children, could not bequeath more than a 12th part of his poſſeſſions to his illegitimate iſſue. *Nov.* 89. *cap.* 12. It is alſo obſervable, that, tho' the law of *England* pays no regard immediately to baſtards, yet it favors their iſſue under particular circumſtances, in reſpect to *real* eſtates; inſomuch that the iſſue of a baſtard *eigne*, who died ſeized, ſhall bar the right of a *mulier puiſne*. For example; if a man dies ſeized of certain lands in fee, leaving two ſons, by the ſame woman, and his eldeſt ſon is a baſtard, being born before his father's marriage, and the younger is a *mulier*, (that is, legitimate,) in this caſe, if the baſtard enters upon the land, claiming as heir to his father, and occupieth it all his life without any interruption or entry made upon him by the *mulier*, and the baſtard hath iſſue and dies ſeized of ſuch eſtate in fee, and the land deſcends to that iſſue, then the *mulier* will be without remedy. For he may not enter, nor have any action to recover the land, becauſe there is an antient law in this caſe uſed; namely, *Juſtum non eſt aliquem poſt mortem facere baſtardum, qui toto tempore vitæ ſuæ pro legitimo habebatur.* See *Coke*'s firſt inſt. ſect. 399, &c. *Bridal*'s lex ſpuriorum, *pag.* 100. Here note, that the term *mulier* is uſed, by the writers upon the common law, to denote either a ſon or a daughter lawfully begotten; but, how they came to apply the word *mulier* ſo very fancifully or rather perverſely, it is hard to ſay, and immaterial to inquire; the moſt probable conjecture ſeems to be, that *mulier* is a corruption of *melior* or the French word *melieur*. vide *Termes de la ley*, and Godolphin's *repertorium*.

De jure accreſcendi inter legitimos hæredes.

§ IV. Si ex pluribus legitimis hæredibus quidam omiſerint hæreditatem, vel morte, vel alia cauſa, impediti fuerint, quominus adeant, reliquis, qui adierint, accreſcit illorum portio: et, licet ante deceſſerint, ad hæredes tamen eorum pertinet.

§ 4. *When there are many legitime heirs, and ſome renounce the inheritance, or are hindered from entering upon it by death, or any other cauſe, then the ſhares or portions of ſuch perſons fall by the right of accretion to thoſe, who have accepted the inheritance; and, altho' the acceptors happen to die even before the refuſal or the failure of their coheirs, yet the portions of ſuch coheirs will appertain to the heirs of the acceptors of the inheritance.*

TITU-

TITULUS QUINTUS.

De ſucceſſione cognatorum.

Tertius ordo ſuccedentium ab inteſtato.

POST ſuos hæredes, eoſque, quos inter ſuos hæredes prætor et conſtitutiones vocant, et poſt legitimos, (quorum numero ſunt agnati, et hi, quos in locum agnatorum tam ſupradicta ſenatus-conſulta, quam noſtra erexit conſtitutio,) proximos cognatos prætor vocat.

After the proper heirs and thoſe, whom the prætor and the conſtitutions call to inherit with the proper heirs, and after the legitime heirs (among whom are the agnati, *and thoſe, whom the above mentioned* ſenatus-conſulta *and our conſtitution have numbered with the* agnati) *the prætor calls the neareſt* cognates, *obſerving the proximity of relation.*

Poſt ſuos hæredes.] " Lex antiqua duodecim " tabularum duos tantum hæredum ab inteſtato " ordines fecit, ſuorum et agnatorum. Novæ " leges et ſenatus-conſulta non addiderunt qui- " dem ordinem novum, ſed perſonas quaſdam, " quæ nec ſui hæredes, nec agnati, revera ſunt, " ſuorum hæredum et agnatorum numero " eſſe voluerunt, atque in ordine ſuorum vel " agnatorum, una cum vere ſuis hæredibus aut " agnatis, ad hæreditatem inteſtati admitti. In- " ter ſuos hæredes novæ leges numerant, ſuiſ- " que per omnia exæquant, liberos legitima- " tos: inter eoſdem quoque, et ſimul cum iis, " vocant nepotes et pronepotes ex ſexu femi- " neo: in agnatorum ordinem ſenatus-conſul- " ta tranſtulerunt matrem et liberos: Juſtinia- " nus fratres et ſorores uterinos, eorumque et " ſororum conſanguinearum filios et filias: Ana- " ſtaſius fratres et ſorores emancipatos. Prætor " vero tres ſuccedentium ab inteſtato ordines " fecit; primum *liberorum*; (non dixit *ſuorum*, " quia ex liberis vocat etiam non ſuos;) alte- " rum *legitimorum*, in quo vocantur agnati et " jura agnationis habentes, ex poſterioribus legi- " bus aut ex ſenatus-conſultis; tertium *cognato- " rum*, in quo admiſit omnes, quos ſola ſan- " guinis ratio vocat ad hæreditatem, licet jure " civili deficiant; item eos, qui, quod prioribus " ordinibus excluſi eſſent, ex nullo alio capite " venire poterant. Tandem Juſtinianus cogna- " tos omnes etiam hæredes legitimos fecit, ad- " empta agnatis omni prærogativa. *Nov.* 118. *Vinn.*

Qui vocantur in hoc ordine. De agnatis capite minutis.

§ I. Qua parte naturalis cognatio ſpectatur. Nam agnati capite diminuti, quique ex his progeniti ſunt, ex lege duodecim tabularum inter legitimos non habentur, ſed à prætore tertio ordine vocantur; exceptis ſolis tantummodo fratre et ſorore emancipatis, non etiam liberis eorum: quos lex Anaſtaſiana cum fratribus integri juris conſtitutis vocat quidem ad legitimam fratris hæreditatem, ſive ſororis; non æquis tamen partibus ſed cum aliqua diminutione, quam facile eſt ex ipſius conſtitutionis verbis intelligere. Aliis vero agnatis inferioris gradus, licet capitis diminutionem paſſi non ſunt, tamen anteponit eos, et procul dubio cognatis.

§ 1. *By the law of the twelve tables, neither the* agnates, *who have ſuffered diminution, nor their iſſue, are eſteemed legitime heirs; but they are called by the prætor in the third order of ſucceſſion: we muſt nevertheleſs except a brother and ſiſter, altho' they are emancipated, but not their children; for the conſtitution of* Anaſtaſius *calls an emancipated brother or ſiſter to the ſucceſſion of a brother or*

ſiſter,

ſiſter, together with thoſe, who have not been emancipated, and are therefore integri juris. *But it does not call them to an equal ſhare of the ſucceſſion, as may eaſily be collected from the very words of the conſtitution. But this conſtitution prefers an emancipated brother or ſiſter to other* agnates *of an inferior degree, altho' uneman-cipated ; and conſequently to all* cognates *in general.*

Quos lex Anaſtaſiana.] This conſtitution is not now extant; it was nevertheleſs without doubt inſerted in the firſt edition of the code, becauſe it is here refered to; but it was probably omited in the *codex repetitæ prælectionis*, on account of the laſt law in *Cod.* 6. *t.* 58. de legit. hæred. *Qua plenius fratribus et ſororibus emancipatis conſulitur, et eorum quoque filiis ac filiabus jus legitimæ ſucceſſionis datur.*

Non æquis tamen partibus.] Hoc eſt, ſi fides ſit *Theophilo*, ut capite diminutus habeat quatuor uncias, et frater integri juris duplum, *i. e.* octo uncias.

Aliis vero agnatis.] Ergo, qui decedit, emancipato fratre et patruo ſuperſtitibus, fratrem ſolum hæredem excluſo patruo habebit.

De conjunctis per fœminas.

§ II. Eos etiam, qui per fœminini ſexus perſonas ex tranſverſo cognatione junguntur, tertio gradu proximitatis nomine prætor ad ſucceſſionem vocat.

§ 2. *Thoſe alſo, who are collaterally related by the female line, are called by the prætor in the third order of ſucceſſion, according to their proximity.*

Eos etiam.] The 118th *Novel* of *Juſtinian* hath rendered the learning in this paragraph intirely uſeleſs, by taking away all the diſtinctions of the antient law between *agnation* and *cognation*.

De liberis datis in adoptionem.

§ III. Liberi quoque, qui in adoptiva familia ſunt, ad naturalium parentum hæreditatem hoc eodem gradu vocantur.

§ 3. *Children, who are in an adoptive family, are likewiſe called in the third order of ſucceſſion to the inheritance of their natural parents.*

De vulgo quæſitis.

§ IV. Vulgo quæſitos nullos habere agnatos, manifeſtum eſt: cum agnatio à patre ſit, cognatio à matre; hi autem nullum patrem habere intelligantur. Eadem ratione nè inter ſe quidem poſſunt videri conſanguinei eſſe: quia conſanguinitatis jus ſpecies eſt agnationis. Tantum ergo cognati ſunt ſibi, ſicut et matri cognati ſunt. Itaque omnibus iſtis ex ea parte competit bonorum poſſeſſio, qua proximitatis nomine cognati vocantur.

§ 4. *It is manifeſt, that baſe born children have no* agnates; *in as much as* agnation *proceeds from the father*, cognation *from the mother*; *and ſuch children are looked upon as having no father. And, for the ſame reaſon, conſanguinity can not be ſaid to ſubſiſt between the baſtard children of the ſame woman; becauſe conſanguinity is a ſpecies of* agnation. *They can therefore only be allied to each other as they are related to their mother, that is, by* cognation; *and it is for this reaſon, that all ſuch children are called to the poſſeſſion of goods by that part of the prætorian edict, by which* cognates *are called by the right of their proximity.*

§ V.

Ex quoto gradu vel agnati vel cognati ſuccedunt.

§ V. Hoc loco et illud neceſſario admonendi ſumus, agnationis quidem jure admitti aliquem ad hæreditatem, etſi decimo gradu ſit, ſive de lege duodecim tabularum quæramus, ſive de edicto, quo prætor legitimis hæredibus daturum ſe bonorum poſſeſſionem pollicetur. Proximitatis vero nomine iis ſolis prætor promittit bonorum poſſeſſionem, qui uſque ad ſextum gradum cognationis ſunt, et ex ſeptimo à ſobrino ſobrinaque nato natave.

§ 5. *In this place it will be neceſſary to obſerve, that any perſon may, by the right of* agnation, *be admited to inherit, altho' he is in the tenth degree; and this is allowed both by the law of the twelve tables, and the edict, by which the prætor promiſes, that he will give the poſſeſſion of goods to the legitime heirs. But the prætor promiſes the poſſeſſion of goods to* cognates, *only as far as the ſixth degree of* cognation, *according to their right of proximity; and, in the ſeventh degree, to thoſe* cognates *only, who are the deſcendents of a couſin german.*

Uſque ad ſextum gradum cognationis.] It is not eaſy to determine what ſhould induce the prætor to fix upon the ſixth rather than the fifth or any other degree; and, concerning this, the writers have differed much in their opinions. But all, except *Hoffman*, agree, that the difference in the limits of ſucceſſion between *agnates* and *cognates* hath ceaſed, ſince the diſtinction between *agnation* and *cognation* was aboliſhed by *Novel* 118. Taking it then for granted, that *cognates* can be called in as diſtant a degree as *agnates*, the next queſtion will be, whether *agnates* can ſucceed in a more diſtant degree, than the tenth; which ſome deny; and urge, that *Juſtinian* would not have named the 10th degree, if *agnates* could have been admited in a degree beyond it—— and that, unleſs ſome period had been put to the ſucceſſion of *agnates*, the third and the fourth order of ſucceſſion, in which are huſband and wife, could never or very rarely be admited; and from hence they conclude, that, tho' in conſequence of the 118th *Novel*, both *agnates* and *cognates* muſt now be admited without diſtinction, according to their proximity, yet this muſt be in the tenth degree, and not beyond it; and of this opinion are *Mynſinger*, *Faber*, *Weſembecius*, and others. But the words of *Juſtinian*, in the 3d ſect. of the 2d title of this book, very ſtrongly evince the contrary. v. g. *Inter maſculos quidem agnationis jure hæreditas, etiamſi* longiſſimo *gradu ſint, ultro citroque capitur*, &c. And again, in paragraph the 1ſt, tit. 7. of this book, the emperor writes thus—— *Amotis ſuis hæredibus*, agnatus, *etiamſi* longiſſimo *gradu, plerumque potior habetur, quam proximior* cognatus. *tit. 7. de ſervili cognatione.* This is alſo the doctrine of the law of the *twelve tables*, which declares generally, without ſpecifying any limits, that upon a failure of proper heirs, the neareſt *agnate* ſhall ſucceed. And, as to the before-mentioned arguments, they may be anſwered without much difficulty; for we may ſafely pronounce, that the words *decimo gradu* are not here uſed determinately, but merely for the ſake of giving an example. *Non enim* (ſays *Vinny*) *eodem modo de* agnatis *et* cognatis *imperator loquitur*; *de* agnatis *non loquitur determinative, ſed ait, eos ſuccedere, etſi decimo gradu ſint, utens rotundo et certo numero pro incerto. De* cognatis *contra loquitur determinative*; *ait enim, eos ſuccedere uſque ad ſextum gradum.* And, to the ſecond argument, it may be anſwered, that a deceaſed perſon may leave no *agnates* by means of emancipation, or that his *agnates*, as ſuch, may be ouſted of their ſucceſſion, by the death or refuſal of the neareſt *agnate*. See *ſect. 7. t. 7. lib. 3.* So that there is no great reaſon to fear, that the third and fourth order of ſucceſſion would have been always excluded by allowing *agnates* to ſucceed in the moſt diſtant degree. It therefore follows upon the whole, that *cognates* and *agnates* are now called to ſucceed equally, according to their proximity, and without any limitation.

TITULUS SEXTUS.

De gradibus cognationum.

D. xxxviii. T. 10.

Continuatio, et cognationis diviſio.

HOC loco neceſſarium eſt exponere, quemadmodum gradus cognationis numerentur. Quare in primis admonendi ſumus, cognationem aliam ſupra numerari, aliam infra, aliam ex tranſverſo, quæ etiam à latere dicitur. Superior cognatio eſt parentum: inferior liberorum: ex tranſverſo fratrum ſororumve, et eorum, qui quæve ex his generantur; et convenienter patrui, amitæ, avunculi, materteræ. Et ſuperior quidem et inferior cognatio à primo gradu incipit: at ea, quæ ex tranſverſo numeratur, à ſecundo.

It is neceſſary in this place to ſhew how the degrees of cognation *are to be computed: and firſt we muſt obſerve, that there is one ſpecies of* cognation, *which relates to aſcendents, another to deſcendents, and a third to collaterals. The firſt and ſuperior* cognation *is that relation, which a man bears to his parents —— the ſecond, or inferior, is that, which he bears to his children —— and the third is that relation, which he bears to his brothers and ſiſters, and their iſſue; and alſo to his uncles and aunts, whether paternal or maternal. The ſuperior and inferior* cognation *commence at the firſt degree; but the tranverſe or collateral* cognation *commences at the ſecond.*

De primo, ſecundo, et tertio gradu.

§ I. Primo gradu eſt ſupra pater, mater: infra filius, filia. Secundo gradu ſupra avus, avia: infra nepos, neptis: ex tranſverſo frater, ſoror. Tertio gradu ſupra proavus, proavia: infra pronepos, proneptis: ex tranſverſo fratris ſororiſque filius, filia: et convenienter patruus, amita, avunculus, matertera. Patruus eſt patris frater, qui Græcis πατραδελφος appellatur. Avunculus eſt frater matris, qui græcè μητραδελφος dicitur: et uterque promiſcue θειος appellatur. Amita eſt patris ſoror, quæ græcè πατραδελφη appellatur; matertera vero matris ſoror, quæ græcè μητραδελφη dicitur: et utraque promiſcue θεια appellatur.

§ 1. *A father, or a mother, is in the firſt degree in the right line aſcending: and a ſon, or a daughter, is alſo in the firſt degree in the right line deſcending. A grand-father, or a grand-mother, is in the ſecond degree in the right line aſcending: and a grandſon, or grand-daughter, is in the ſecond degree in the right line deſcending: and a brother, or a ſiſter, is alſo in the ſecond degree in the collateral line. A great-grand-father, or a great-grand-mother, is in the third degree in the right line aſcending; and a great-grandſon, or great-grand-daughter, is in the third degree in the right line deſcending: and the ſon or daughter of a brother or ſiſter is alſo in the third degree in the collateral line; and by a parity of reaſoning an uncle, or an aunt, whether paternal or maternal, is alſo in the third degree. A paternal*

nal uncle, called patruus, *is a father's brother*; —— *a maternal uncle, called* avunculus, *is a mother's brother*; —— *a paternal aunt, called* amita, *is a father's ſiſter*; —— *and a maternal aunt, called* matertera, *is a mother's ſiſter. And each of theſe perſons is called in Greek* θεῖος *or* θεῖα *promiſcuouſly.*

Primo gradu eſt ſupra pater.] In *England* all relationſhip, as far as perſonal eſtate only is concerned, is meaſured according to the computation of degrees by the civil law.

Θεῖοι.] The Greeks called their parents θεοὶ, (i. e. *divinities,*) and applied the term θεῖοι (i. e. *divine,*) even to thoſe, who held the place of parents. See Dr. *Taylor*'s Elem. 325.

Quartus gradus.

§ II. Quarto gradu ſupra abavus, abavia: infra abnepos, abneptis: ex tranſverſo fratris ſororiſque nepos neptiſve: et convenienter patruus magnus, amita magna, id eſt, avi frater et ſoror: item avunculus magnus et matertera magna, id eſt, aviæ frater et ſoror: conſobrinus, conſobrina, id eſt, qui quæve ex ſororibus aut fratribus procreantur. Sed quidam recte conſobrinos eos proprie dici putant, qui ex duabus ſororibus progenerantur, quaſi conſororinos: eos vero, qui ex duobus fratribus progenerantur, proprie fratres patrueles vocari: ſi autem ex duobus fratribus filiæ naſcuntur, ſorores patrueles appellari. At eos, qui ex fratre et ſorore progenerantur, amitinos proprie dici putant. Amitæ tuæ filii conſobrinum te appellant, tu illos amitinos.

§ 2. *A great-great-grand-father, or a great-great-grand mother, is in the fourth degree in the right line aſcending; and a great-great-grandſon, or a great great-grand-daughter, is in the fourth degree in the right line deſcending. Alſo, in the tranſverſe or collateral line, the grandſon, or the grand-daughter, of a brother or a ſiſter, is in the fourth degree; and conſequently a great uncle, or great aunt, paternal or maternal, is in the fourth degree: and alſo couſins german, who are called* conſobrini. *But ſome have been rightly of opinion, that the children of ſiſters are only properly called* conſobrini, *quaſi* conſororini; —— *that the children of brothers are properly called* fratres patrueles, *or brothers* patruel, *if males*; *and* ſorores patrueles, *or ſiſters* patruel, *if females*; —— *and that, when there are children of a brother, and children of a ſiſter, they are properly called* amitini; *but the ſons of your aunt by the father's ſide call you* conſobrinus, *and you call them* amitini.

Conſobrinus conſobrina.] It will be neceſſary to explain the following terms of relation before we proceed. —— *Conſobrini* and *conſobrinæ* denote couſins german in *general*; i. e. brother's and ſiſter's children. —— *Fratres patrueles* and *ſorores patrueles* ſignify couſins german, when they are the ſons or daughters of brothers. —— *Conſobrini* and *conſobrinæ* in a *limited* and ſtrict ſenſe denote couſins german, who are the children of two ſiſters, *quaſi conſororini*. —— *Amitini* and *amitinæ* are couſins german, who are the children of a brother on the one ſide and a ſiſter on the other. —— *Sobrini* and *ſobrinæ* denote the children of couſins german in general. —— *Propior ſobrino* and *propior ſobrina* denote the ſon or daughter of a great-uncle or great-aunt, paternal or maternal.

Quintus gradus.

§ III. Quinto gradu ſupra atavus, atavia: infra atnepos, atneptis: ex tranſverſo fratris ſororiſque pronepos, proneptis: et convenienter propatruus, proamita, id eſt, proavi frater et ſoror: et proavunculus et promatertera, id eſt, proaviæ frater et ſoror: item fratris patruelis, vel ſoro-

ris

ris patruelis, conſobrini et conſobrinæ, amitini et amitinæ filius, filia: propior ſobrino, propior ſobrina: hi ſunt patrui magni, amitæ magnæ, avunculi magni, materteræ magnæ filius, filia.

§ 3. *A great-grand-father's grand-father, or a great-grand-father's grand-mother, is in the fifth degree in the line aſcending, and a great-grandſon, or a great-grand-daughter, of a grandſon or grand-daughter is in the fifth degree in the line deſcending. And, in the tranſverſe or collateral line, a great-grandſon, or great grand-daughter, of a brother or ſiſter, is alſo in the fifth degree: and conſequently a great-grand-father's brother or ſiſter, or a great-grand-mother's brother or ſiſter, is in the fifth degree. The ſon or daughter alſo of a couſin german is in the fifth degree; and ſo is the ſon or daughter of a great uncle or great aunt, paternal or maternal; and ſuch ſon, or daughter, is called* propior ſobrino *and* propior ſobrina.

Sextus gradus.

§ IV. Sexto gradu ſupra tritavus, tritavia: infra trinepos, trineptis: ex tranſverſo fratris ſororiſque abnepos, abneptis: et convenienter abpatruus, abamita, id eſt, abavi frater et ſoror: abavunculus, abmatertera, id eſt, abaviæ frater et ſoror: item propatrui, proamitæ, proavunculi, promateterteræ filius, filia: item propius ſobrino ſobrinave filius, filia: item conſobrini conſobrinæ nepos, neptis: item ſobrini, ſobrinæ; id eſt, qui quæve ex fratribus vel ſororibus patruelibus, vel conſobrinis, vel amitinis, progenerantur.

§ 4. *A great-grand-father's great-grand-father, or a great-grand-father's great-grand-mother, is in the ſixth degree in the line aſcending; and the great-grandſon, or great-grand daughter of a great-grandſon, or a great-grand daughter, is likewiſe in the ſixth degree in the line deſcending. And, in the tranſverſe or collateral line, a great-great-grandſon, or a great-great-grand-daughter, of a brother or ſiſter, is alſo in the ſixth degree: and conſequently a great-great-grand-father's brother or ſiſter, and a great-great-grand-mother's brother or ſiſter, is in the ſixth degree. And the ſon or daughter of a great-great-uncle, or great-great-aunt, paternal or maternal, is alſo in the ſixth degree; and ſo alſo is the ſon or daughter of the ſon or daughter of a great-uncle or great-aunt, paternal or maternal. The grandſon alſo, or the grand-daughter, of a couſin german is in the ſixth degree; and, in the ſame degrees between themſelves, we reckon the* ſobrini *and the* ſobrinæ, *that is, the ſons and daughters of couſins german in general, whether ſuch couſins german are ſo related by two brothers, or by two ſiſters, or by a brother and a ſiſter.*

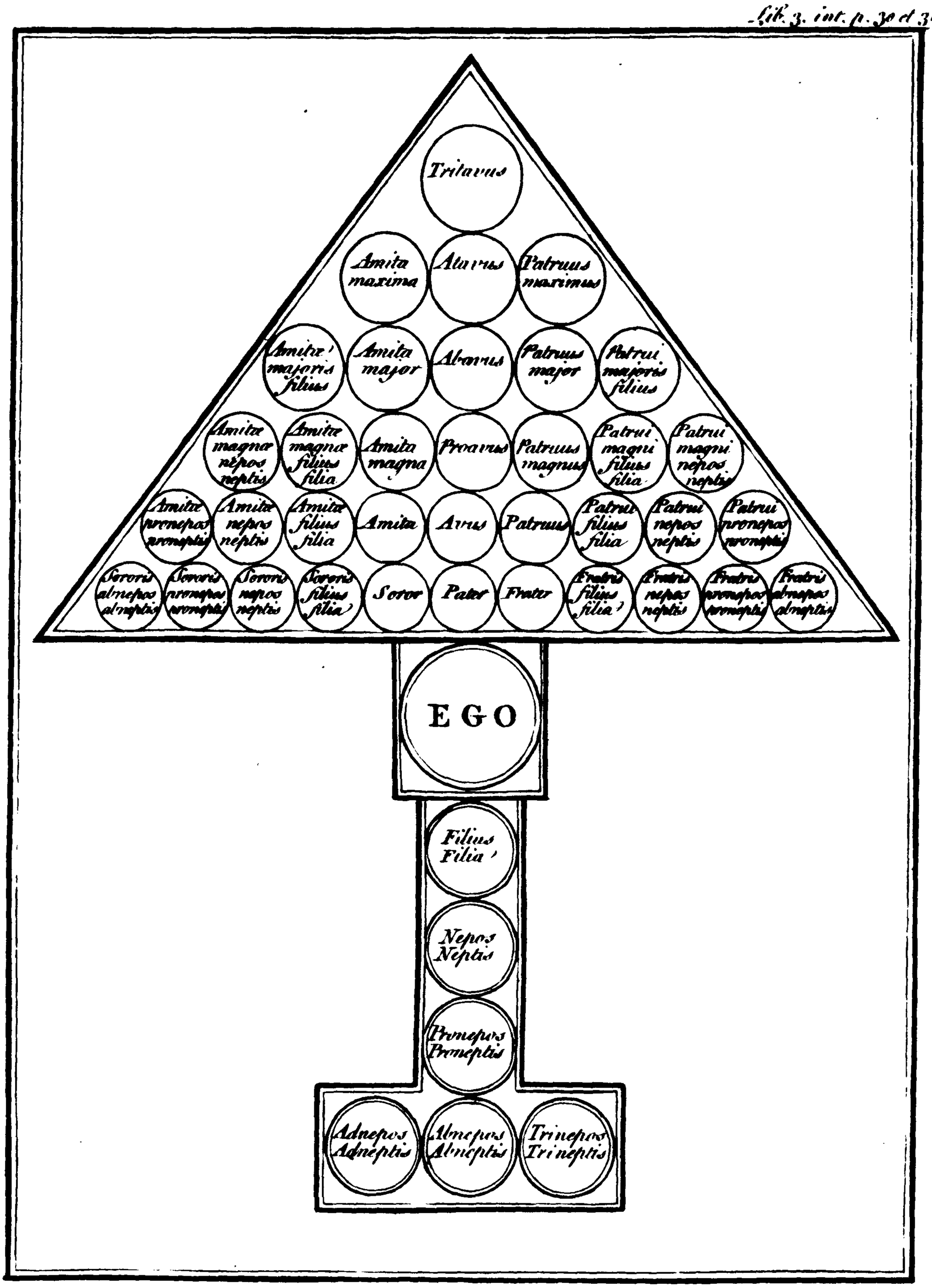
De reliquis gradibus.

§ V. Hactenus oſtendiſſe ſufficiat, quemadmodum gradus cognationis numerentur. Namque ex his palam eſt intelligere, quemadmodum ulteriores quoque gradus numerare debeamus: quippe ſemper generata perſona gradum adjicit: ut longe facilius ſit reſpondere, quoto quiſque gradu ſit, quam proprie cognationis appellatione quemquam denotare.

§ 5. *It is ſufficient to have ſhewed thus far, how the degrees of* cognation *are enumerated: and, from the examples given, it is evident in what manner we ought to compute the more remote degrees; for every perſon generated always adds one degree; ſo that it is much eaſier to determine, in what degree any perſon is related to another, than to denote ſuch perſon by a proper term of* cognation.

§ VI.

Lib. 3. int. p. 30 et 31.



De gradibus agnationis.

§ VI. Agnationis quoque gradus eodem modo numerantur.

§ 6. *The degrees of* agnation *are enumerated in the ſame manner, as the degrees of* cognation.

De graduum deſcriptione.

§ VII. Sed, cum magis veritas oculata fide, quam per aures animis hominum, infigatur, ideo neceſſarium duximus, poſt narrationem graduum, eos etiam præſenti libro inſcribi, quatenus poſſint et auribus et oculorum inſpectione adoleſcentes perfectiſſimam graduum doctrinam adipiſci.

§ 7. *But as truth is fixed in the mind much better by the eye, than by the ear, we have therefore thought it neceſſary, to ſubjoin to the account already given, a tablet with the degrees of* cognation *inſcribed upon it; that the ſtudent, both by hearing and ſeeing, may attain a moſt perfect knowledge of them.*

TITULUS SEPTIMUS.

De fervili cognatione.

D. xxxviii. T. 2. C. vi. T. 4.

ILLUD certum eſt, ad ſerviles cognationes illam partem edicti, qua proximitatis nomine bonorum poſſeſſio promittitur, non pertinere: nam nec ulla antiqua lege talis cognatio computabatur. Sed noſtra conſtitutione, quam pro jure patronatus fecimus, (quod jus uſque ad noſtra tempora ſatis obſcurum atque nube plenum, et undique confuſum fuerat,) et hoc humanitate ſuggerente conceſſimus, ut, ſi quis, in ſervili conſtitutus conſortio, liberum vel liberos habuerit, ſive ex libera ſive ex ſervilis conditionis muliere, vel contra ſerva mulier ex libero vel ſervo habuerit liberos cujuſcunque ſexus, et, ad libertatem his pervenientibus, ii, qui ex ſervili ventre nati ſunt, libertatem meruerint, vel, dum mulieres liberæ erant, ipſi in ſervitute eos habuerint, et poſtea ad libertatem perverint, ut hi omnes ad ſucceſſionem patris vel matris veniant, patronatus jure in hac parte ſopito. Hos etenim liberos non ſolum in ſuorum parentum ſucceſſionem, ſed etiam alterum in alterius ſucceſſionem mutuam, vocavimus; ex illa lege ſpecialiter eos vocantes, ſive ſoli inveniantur, qui in ſervitute nati et poſtea manumiſſi ſunt; ſive una cum aliis, qui poſt libertatem parentum concepti ſunt; ſive ex eodem patre, ſive ex eadem matre, ſive ex aliis nuptiis; ad ſimilitudinem eorum, qui ex juſtis nuptiis procreati ſunt.

It is certain, that the part of the edict, in which the poſſeſſion of goods is promiſed, according to the right of proximity, does not relate to ſervile cognation; *neither hath ſuch* cognation *been regarded by any antient law. But, by our own conſtitution, concerning the right of patronage, which right was heretofore obſcure, and every way confuſed, we have ordained (humanity ſo ſuggeſting) that, if a ſlave ſhall have a child, or children, either by a free-woman, or by a bond-woman, with whom he lives* in contubernio, *and, on the contrary, that, if a bond-woman ſhall have a child, or children, of either ſex by a freeman, or by a ſlave, with whom ſhe lives* in contubernio, *and ſuch father and mother are afterwards infranchiſed, the children ſhall ſucceed to their father or mother, no regard being paid to the right of patronage. And we have not only called theſe children to the ſucceſſion of their parents, but alſo to ſucceed each other mutually, whether they are ſole in ſucceſſion, having all been born in ſervitude and afterwards manumited, or whether they ſucceed with others, who were conceived after the infranchiſement of their parents, and whether they are all by the ſame father and mother, or by a different father, or a different mother. And, in brief, we have been willing, that children born in ſlavery, and afterwards manumited, ſhould ſucceed in the ſame manner, as thoſe, who are the iſſue of parents legally married.*

Sed noſtra conſtitutione.] This conſtitution is not extant.

Collatio ordinum et graduum.

§ I. Repetitis itaque omnibus, quæ jam tradidimus, apparet non ſemper eos, qui parem gradum cognationis obtinent, pariter vocari: eoque amplius, ne eum quidem, qui proximior ſit cognatus, ſemper potiorem eſſe. Cum enim prima cauſa ſit ſuorum hæredum, et eorum, quos inter ſuos hæredes enumeravimus, apparet, pronepotem vel abnepotem defuncti potiorem eſſe, quam fratrem, aut patrem, aut matrem defuncti: cum alioqui pater quidem et mater (ut ſupra quoque tradidimus) primum gradum cognationis obtineant, frater vero ſecundum, pronepos autem tertio gradu ſit cognationis, et abnepos quarto: nec intereſt, in poteſtate morientis fuerit, an non, quod vel emancipatus, vel ex emancipato, aut fœmineo ſexu, propagatus eſt. Amotis quoque ſuis hæredibus, et quos inter ſuos hæredes vocari diximus, agnatus, qui integrum jus habet agnationis, etiamſi longiſſimo gradu ſit, plerumque potior habetur, quam proximior cognatus: nam patrui nepos vel pronepos avunculo vel materteræ præfertur. Toties igitur dicimus, aut potiorem haberi eum, qui proximiorem gradum cognationis obtinet, aut pariter vocari eos, qui cognati ſunt; quoties neque ſuorum hæredum, quique inter ſuos hæredes ſunt, neque agnationis jure aliquis præferri debeat, ſecundum ea, quæ tradidimus: exceptis fratre et ſorore emancipatis, qui ad ſucceſſionem fratrum vel ſororum vocantur: qui, etſi capite diminuti ſunt, tamen præferuntur cæteris ulterioris gradus agnatis.

§ 1 *By what we have already ſaid, it appears, that thoſe, who are in an equal degree of* cognation, *are not always called equally to the ſucceſſion; and farther, that even he, who is the neareſt of kin, is not conſtantly to be prefered. For, inaſmuch as the firſt place is given to* proper heirs, *and to thoſe, who are numbered with proper heirs,*

heirs, it is apparent, that the great-grandſon, or great-great-grandſon, is preferred to the brother or even the father or mother of the deceaſed: altho' a father and mother, (as we have before obſerved,) obtain the firſt degree of relation, a brother the ſecond, a great-grandſon the third, and a great-great-grandſon the fourth: neither does it make any difference, whether ſuch grand-children were under the power of the deceaſed, at the time of his death, or out of his power; either by being emancipated, or by being the children of thoſe, who were emancipated: neither can it be objected, that they are deſcended by the female line. But, when there are no proper heirs, nor any of thoſe, who are permited to rank with them, then an agnate, *who hath the full right of* agnation *in him, altho' he is in the* moſt diſtant *degree, is generally prefered to a* cognate, *who is in the neareſt degree; thus the grandſon or great-grandſon of a paternal uncle is prefered to an uncle or aunt, who is maternal. We therefore obſerve, that, when there are no proper heirs, nor any, who are numbered with them, nor any, who ought to be prefered by the right of* agnation, *(as we have before noted) then he, who is in the neareſt degree of* cognation, *is called to the ſucceſſion; and that, if there are many in the ſame degree, they are all called equally. But a brother and ſiſter, altho' emancipated, are yet called to the ſucceſſion of brothers and ſiſters; for, altho' they have ſuffered diminution, they are neverthelefs prefered to all* agnates *of a more remote degree.*

TITULUS OCTAVUS.

De ſucceſſione libertorum.

D. xxxviii. T. 2.

Qui ſuccedunt. De lege duodecim tabularum.

NUNC de libertorum bonis videamus. Olim itaque licebat liberto patronum ſuum impune teſtamento præterire: nam ita demum lex duodecim tabularum ad hæreditatem liberti vocabat patronum, ſi inteſtatus mortuus eſſet libertus, hærede ſuo nullo relicto. Itaque, inteſtato mortuo liberto, ſi is ſuum hæredem reliquiſſet, patrono nihil in bonis ejus juris erat. Et, ſiquidem ex naturalibus liberis aliquem ſuum hæredem reliquiſſet, nulla videbatur querela: ſi vero adoptivus filius fuiſſet, aperte iniquum erat, nihil juris patrono ſupereſſe.

Let us now treat of the ſucceſſion of freed-men. A freed-man had it formerly in his power, without being ſubject to any penalty, wholly to omit in his teſtament any mention of his patron: for the law of the twelve tables called the patron to the inheritance, only when the freed-man died inteſtate and without proper heirs; *and therefore, tho' a freed-man had died inteſtate, yet, if he had left a proper heir, the patron would have received no benefit: and indeed, when the natural and legitimate children of the deceaſed became his heirs, there ſeemed no cauſe of complaint; but, when the freed-man left only an adopted ſon, it was manifeſtly injuricus, that the patron ſhould have no claim.*

De jure prætorio.

§ I. Qua de cauſa poſtea prætoris edicto hæc juris iniquitas emendata eſt. Sive enim faciebat teſtamentum libertus, jubebatur ita teſtari, ut patrono partem dimidiam bonorum ſuorum relinqueret; et, ſi aut nihil aut minus parte dimidia reliquerat, dabatur patrono contra tabulas teſtamenti partis dimidiæ bonorum poſſeſſio : ſive inteſtatus moriebatur, ſuo hærede relicto filio adoptivo, dabatur æque patrono contra hunc ſuum hæredem partis dimidiæ bonorum poſſeſſio. Prodeſſe autem liberto ſolebant, ad excludendum patronum, naturales liberi, non ſolum quos in poteſtate mortis tempore habebat, ſed etiam emancipati, et in adoptionem dati, ſi modo ex aliqua parte ſcripti hæredes erant, aut præteriti contra tabulas bonorum poſſeſſionem ex edicto prætorio petierant. Nam exhæredati nullo modo repellebant patronum.

§ 1. *The law was therefore afterwards amended by the edict of the prætor: for every freed-man, who made his teſtament, was commanded ſo to diſpoſe of his effects, as to leave a moity to his patron: and, if the teſtator left nothing, or leſs than a moity, then the poſſeſſion of half was given to the patron* contra tabulas, *i. e. contrary to the diſpoſition of the teſtament. And, if a freed-man died inteſtate, leaving an adopted ſon his heir, the poſſeſſion of a moity of the effects was in this caſe alſo given to the patron notwithſtanding ſuch heir : yet not only the natural and lawful children of a freed-man, whom he had under his power at the time of his death, excluded the patron, but thoſe children alſo, who were emancipated, and given in adoption, if they were writen heirs for any part, or even, altho' they were omited, if they had requeſted the* poſſeſſion CONTRA TABULAS, *by virtue of the* prætorian edict. *But diſinherited children by no means repelled the patron.*

De lege Papia.

§ II. Poſtea vero lege Papia adaucta ſunt jura patronorum, qui locupletiores libertos habebant. Cautum enim eſt, ut ex bonis ejus, qui ſeſtertium centum millium patrimonium reliquerat, et pauciores quam tres liberos habebat, ſive is teſtamento facto, ſive inteſtatus mortuus erat, virilis pars patrono deberetur. Itaque, cum unum quidem filium filiamve hæredem reliquerat libertus, perinde pars dimidia debebatur patrono, ac ſi is ſine ullo filio filiave inteſtatus deceſſiſſet: cum vero duos duaſve hæredes reliquerat, tertia pars debebatur patrono: ſi tres reliquerat, repelebatur patronus.

§ 2. *But afterwards the rights of thoſe patrons, who had wealthy freed-men, were inlarged by the* Papian *law: by which it is provided, that an equal ſhare ſhall be due to the patron out of the effects of his freed-man, whether dying teſtate or inteſtate, who hath left a patrimony of an hundred thouſand* ſeſtertii *and fewer than three children: ſo that, when a freed-man hath left only one ſon or daughter, then a moity of the effects is due to the patron, as if the deceaſed had died teſtate without either ſon or daughter. But, when there are two heirs male or female, a third part only is due to the patron; and, when there are three, the patron is wholly excluded.*

Lege

Lege Papia.] This law was made in the conſulate of *M. Papius Mutilus* and *Q. Poppæus ſecundus*, in the year of *Rome* 761. *Vinn.*

De conſtitutione Juſtiniani.

§ III. Sed noſtra conſtitutio, (quam pro omni natione græca lingua compendioſo tractatu habito compoſuimus,) ita hujuſmodi cauſam definivit: ut, ſiquidem libertus vel liberta minores centenariis ſint, id eſt, minus centum aureis habeant ſubſtantiam, (ſic enim legis Papiæ ſummam interpretati ſumus, ut pro mille ſeſtertiis unus aureus computetur,) nullum locum habeat patronus in eorum ſucceſſione, ſi tamen teſtamentum fecerint: ſin autem inteſtati deceſſerint, nullo liberorum relicto, tunc patronatus jus, quod erat ex lege duodecim tabularum, integrum reſervavit. Cum vero majores centenariis ſint, ſi hæredes vel bonorum poſſeſſores liberos habeant, ſive unum, ſive plures, cujuſcunque ſexus vel gradus, ad eos ſucceſſiones parentum deduximus, patronis omnibus modis cum ſua progenie ſemotis. Sin autem ſine liberis deceſſerint, ſiquidem inteſtati, ad omnem hæreditatem patronos patronaſque vocavimus. Si vero teſtamentum quidem fecerint, patronos autem aut patronas præterierint, cum nullos liberos haberent, vel habentes eos exhæredaverint, vel mater ſive avus maternus eos præterierint, ita quod non poſſint argui inofficioſa eorum teſtamenta, tunc ex noſtra conſtitutione per bonorum poſſeſſionem contra tabulas, non dimidiam, ut antea, ſed tertiam partem bonorum liberti conſequantur; vel quod deeſt eis, ex conſtitutione noſtra repleatur, ſi quando minus tertia parte bonorum ſuorum libertus vel liberta eis reliquerit: ita ſine onere, ut nec liberis liberti libertæve ex ea parte legata vel fideicommiſſa præſtentur, ſed ad cohæredes eorum hoc onus redundet: multis aliis caſibus à nobis in præfata conſtitutione congregatis, quos neceſſarios eſſe ad hujuſmodi diſpoſitionem juris perſpeximus: ut tam patroni patronæque quam liberi eorum, nec non qui ex tranſverſo latere veniunt uſque ad quintum gradum, ad ſucceſſionem libertorum libertarumve vocentur, ſicut ex ea conſtitutione intelligendum eſt. Et, ſi ejuſdem patroni vel patronæ vel duorum duarumque pluriumve liberi ſint, qui proximior eſt, ad liberti vel libertæ vocetur ſucceſſionem: et in capita, non in ſtirpes, dividatur ſucceſſio: eodem modo et in iis, qui ex tranſverſo latere veniunt, ſervando. Pene enim conſonantia jura ingenuitatis et libertinitatis in ſucceſſionibus fecimus.

§ 3. *But by our imperial conſtitution, (which we have cauſed to be promulged in the Greek language, for the benefit of all nations,) we have ordained, that, if a freed-man, or freed-woman, dies poſſeſſed of leſs than an hundred* aurei, *(for thus have we interpreted the ſum mentioned in the* Papian law, *counting one* aureus *for a thouſand* ſeſtertii,*) the patron ſhall not be intituled to any ſhare in the ſucceſſion, where there is a will. But, if either a freed-man, or freed-woman, dies inteſtate, and without children, we have in this caſe reſerved the right of patronage intire, as it formerly was, according to the law of the twelve tables. But, if a freed perſon dies worth more than an hundred* aurei, *and leaves one child, or many, of either*

either ſex or any degree, as the heirs and poſſeſſors of his goods, we have permited, that ſuch child or children ſhall ſucceed their parent to the intire excluſion of the patron and his heirs: and, if any freed-perſons die without children and inteſtate, we have called their patrons or patroneſſes to their whole inheritances. And if any freed-perſon, worth more than an hundred aurei, *hath made a teſtament, omited his patron, and left no children, or hath diſinherited them; or if a mother, or maternal grand-father, being freed-perſons, have omited to mention their children in their wills, ſo that ſuch wills can not be proved to be inofficious, then, by virtue of our conſtitution, the patron ſhall ſucceed, not to a moity as formerly, but to the third part of the eſtate of the deceaſed, by the poſſeſſion of the goods, called* contra tabulas: *and, when freed-perſons, men or women, leave leſs than the third part of their effects to their patrons, our conſtitution ordains, that the deficiency ſhall be ſupplied; and that this third part, due to patrons, ſhall not be ſubject to the burden of* truſts, *or legacies, even for the benefit of the children of the deceaſed; for the co-heirs only of the patron ſhall be loaded with this burden. In the before-mentioned conſtitution, we have collected many more caſes, which we have thought neceſſary in relation to the right of patronage, that patrons and patroneſſes, their children and collateral relations, as far as the fifth degree, might be called to the ſucceſſion of their freed-men and freed-women; as will appear more fully from our ordinance itſelf. And, if there are many children of one patron or patroneſs, or of two or more patrons or patroneſſes, he, who is neareſt in degree, is called to the ſucceſſion of his freed-man or freed-woman; and, when there are many in equal degree, the eſtate muſt be divided* in capita *and not* in ſtirpes; *and the ſame order is decreed to be obſerved among the collaterals of patrons and patroneſſes: for we have rendered the laws of ſucceſſion almoſt the ſame in regard to the* ingenui *and* libertini.

Sed noſtra conſtitutio.] This conſtitution is not extant.

Ex conſtitutione noſtra repleatur.] "Intelligit "haud dubie conſtitutionem, l. *omnimodo. Cod.* "3. *t.* 28. *de inofficioſo teſtamento.*" *Vinn.*

Quibus libertinis ſucceditur.

§ IV. Sed hæc de iis libertinis hodie dicenda ſunt, qui in civitatem Romanam pervenerunt, cum nec ſint alii liberti, ſimul et Dedititiis et Latinis ſublatis, cum Latinorum ſucceſſiones nullæ penitus erant: quia licet ut liberi vitam ſuam peragebant, attamen ipſo ultimo ſpiritu ſimul animam atque libertatem amittebant: et, quaſi ſervorum, ita bona eorum jure quodammodo peculii ex lege Junia Norbana manumiſſores detinebant. Poſtea vero ſenatus-conſulto Largiano cautum fuerat, ut liberi manumiſſoris, non nominatim exhæredati facti, extraneis hæredibus eorum in bonis Latinorum præponerentur. Quibus etiam ſupervenit Divi Trajani edictum, quod eundem hominem, ſi, invito vel ignorante patrono, ad civitatem Romanam venire ex beneficio principis feſtinarat, faciebat quidem vivum civem, Latinum vero morientem. Sed noſtra conſtitutione, propter hujuſmodi conditionum vices et alias difficultates, cum ipſis Latinis etiam legem Juniam, et ſenatus-conſultum Largianum, et edictum Divi Trajani, in perpetuum deleri cenſuimus, ut omnes liberi civitate Romana fruantur; et mirabili modo quibuſdam adjectionibus ipſas vias, quæ

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in Latinitatem ducebant, ad civitatem Romanam capiendam transposuimus.

§ 4. *But what we have said relates to the* libertini *of the present time, who are all citizens of* Rome; *for there is now no other species of freed-men; that of the* Dedititii *and* Latini *being abolished: the latter of whom never enjoyed any right of succession; for altho' they led the lives of freed-men, yet, with their last breath, they lost both their lives and liberties: for their possessions, like the goods of slaves, were detained by their manumitor, who possessed them, as a* peculium, *by virtue of the law* Junia Norbana. *It was afterwards provided by the* senatus-consultum Largianum, *that the children of a manumitor, who were not nominally disinherited, should be prefered to any strangers, whom a manumitor might constitute his heirs: then followed the edict of* Trajan, *which ordained, that, if a slave either against the will or without the knowledge of his patron should obtain the freedom of* Rome *by the favor of the emperor, such slave should continue free, whilest living, but, at his death, should be regarded only as a* Latin. *But we, being averse to these changes of condition and dissatisfied with the difficulties attending them, have thought proper, by virtue of our constitution, for ever to abolish, together with the* Latins, *the law* Junia, *the* senatus-consultum Largianum, *and the edict of* Trajan; *to the intent, that all freed-men may become freed-men of* Rome. *And we have happily contrived by some additions, that the manner of confering the freedom of* Latins *should now become the manner of confering the freedom of* Rome.

Nostra constitutione.] *vid. Cod. 7. t. 6. de latina libertate tollenda.*

TITULUS NONUS.

De assignatione libertorum.

D. xxxviii. T. 4.

An assignari possit, et quis assignationis effectus.

IN summa, (quod ad bona libertorum attinet,) admonendi sumus, censuisse senatum, ut quamvis ad omnes patroni liberos, qui ejusdem gradus sunt, æqualiter bona libertorum pertineant; tamen licere parenti, uni ex liberis assignare libertum, ut post mortem ejus solus is patronus habeatur, cui assignatus est; et cæteri liberi, qui ipsi quoque ad eadem bona, nulla assignatione interveniente, pariter admitterentur, nihil juris in his bonis habeant; sed ita demum pristinum jus recipiant, si is, cui assignatus est, decesserit nullis liberis relictis.

In regard to the possession of freed-men it must be remembered, that the senate hath decreed, that, altho' the goods of freed men belong equally to all the children of the patron, who are in the same degree, yet it is lawful for a parent to assign a freed man to any one of his children, so that, after the death of the parent, the child, to whom the freed-man was assigned, is solely to be esteemed his patron: and the other children, who would have been equally admited to a di-

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vidend of the goods of the freed-man, had he not been aſſigned, are wholly excluded; but, if the aſſignèe happens to die without iſſue, the excluded children regain their former right.

Cenſuiſſe ſenatum.] This decree was in the reign of CLAUDIAN, *anno urb. cond.* 798.

De ſexu aſſignati, et de ſexu graduque ejus, cui aſſignatur.

§ I. Nec tantum libertum, ſed etiam libertam, et non tantum filio nepotive, ſed etiam filiæ neptive, aſſignare permittitur.

§ 1. *Every freed-perſon is aſſignable, whether man or woman: and an aſſignment may be made not only to a ſon or grandſon, but to a daughter or granddaughter.*

De liberis in poteſtate vel emancipatis.

§ II. Datur autem hæc aſſignandi facultas ei, qui duos pluresve liberos in poteſtate habebit, ut eis, quos in poteſtate habet, aſſignare libertum libertamve liceat. Unde quærebatur, ſi eum, cui aſſignavit, poſtea emancipaverit, num evaneſcat aſſignatio? Sed placuit evaneſcere: quod et Juliano et aliis pleriſque viſum eſt.

§ 2. *The power of aſſigning freed-perſons is given to him, who hath two or more children unemancipated, ſo that a father may aſſign a freed-man or freed-woman to thoſe children, whom he retains under his power: and hence it became a queſtion, if a father ſhould aſſign a freed-man to his ſon and afterwards emancipate that ſon, whether the aſſignment would, or would not be null? and the deciſion hath been in the affirmative; which hath been approved of by* Julian *and many others.*

Quibus modis aut verbis aſſignatio fit: et de ſenatus-conſulto.

§ III. Nec intereſt, an teſtamento quis aſſignet, an ſine teſtamento; ſed etiam quibuſcunque verbis patronis hoc permittitur facere, ex ipſo SC. quod Claudianis temporibus factum eſt, Sabellio Rufo et Aſterio Scapula Conſulibus.

§ 3. *But it makes no difference, whether the aſſignment of a freed-man is made by teſtament, or not by teſtament; for patrons may aſſign even by word of mouth; which was permited by the* ſenatus-conſultum, *made in the reign of* Claudian *in the conſulate of* Sabellius Rufus *and* Aſterius Scapula.

TITU-

TITULUS DECIMUS.

De bonorum poſſeſſionibus.

D. xxxvii. T. 1.

Cur introductæ bonorum poſſeſſiones; et quis ſit earum effectus.

JUS bonorum poſſeſſionis introductum eſt à prætore emendandi veteris juris gratia. Nec ſolum in inteſtatorum hæreditatibus vetus jus eo modo prætor emendavit, ſicut ſupra dictum eſt; ſed in eorum quoque, qui teſtamento facto deceſſerint. Nam, ſi alienus poſthumus hæres fuerit inſtitutus, quamvis hæreditatem jure civili adire non poterat, cum inſtitutio non valebat, honorario tamen jure bonorum poſſeſſor efficiebatur; videlicet cum à prætore adjuvabatur. Sed et is à noſtra conſtitutione hodie recte hæres inſtituitur, quaſi et jure civili non incognitus. Aliquando tamen neque emendandi neque impugnandi veteris juris, ſed magis confirmandi gratia, prætor pollicetur bonorum poſſeſſionem. Nam illis quoque, qui, recte teſtamento facto, hæredes inſtituti ſunt, dat ſecundum tabulas bonorum poſſeſſionem. Item ab inteſtato ſuos hæredes, et agnatos, ad bonorum poſſeſſionem vocat. Sed et remota quoque bonorum poſſeſſione ad eos pertinet hæreditas jure civili. Quos autem ſolus prætor vocat ad hæreditatem, hæredes quidem ipſo jure non fiunt: nam prætor hæredem facere non poteſt: per legem enim tantum, vel ſimilem juris conſtitutionem, hæredes fiunt, vel per ſenatus-conſulta et conſtitutiones principales: ſed, cum eis prætor dat bonorum poſſeſſionem, loco hæredum conſtituuntur, et vocantur bonorum poſſeſſores. Adhuc autem et alios complures gradus prætor fecit in bonorum poſſeſſionibus dandis, dum id agebat, ne quis ſine ſucceſſore moreretur. Nam, anguſtiſſimis finibus conſtitutum per legem duodecim tabularum, jus percipiendarum hæreditatum prætor ex bono et æquo dilatavit.

The right of ſucceeding by the poſſeſſion of goods was introduced by the prætor, in amendment of the antient law; which he corrected, not only in regard to the inheritances of inteſtates, (as we have before obſerved;) but in regard alſo to the inheritances of thoſe, who die teſtate: for, if a poſthumous ſtranger was inſtituted an heir, altho' he could not enter upon the inheritance by the civil law, inaſmuch as his inſtitution as heir would not be valid, yet by the prætorian or honorary law he might be made the poſſeſſor of the goods, when he had received the aſſiſtence of the prætor. *But ſuch ſtranger may at this time, by virtue of our conſtitution, be legally inſtituted an heir, being no longer regarded as a perſon unknown to the civil law. But the prætor ſometimes beſtows the poſſeſſion of goods,*

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intending neither to amend nor impugn the old law, but only to confirm it: for he gives the poſſeſſion of goods ſecundum tabulas *to thoſe, who are appointed the heirs of the deceaſed by a regular teſtament. He alſo calls* proper heirs *and* agnates *to the poſſeſſion of the goods of inteſtates; and yet the inheritance would be their own by the* civil law, *altho' the prætor did not interpoſe his authority. But thoſe, whom the prætor calls to an inheritance merely by virtue of his office, do not become legal heirs; inaſmuch as the prætor can not make an heir; for heirs are made only by law, or by what has the effect of a law, as a decree of the ſenate, or an imperial conſtitution. But, when the prætor gives any perſons the poſſeſſion of goods, they ſtand in the place of heirs, and are called the poſſeſſors of the goods. But the prætor hath alſo deviſed many other orders of perſons, to whom the poſſeſſion of goods can be granted, to the intent, that no man may die without a ſucceſſor: and, by the rules of juſtice and equity, he hath greatly inlarged the right of taking inheritances, which was bounded within the moſt narrow limits by the laws of the twelve tables.*

Jus bonorum poſſeſſionis.] The *bonorum poſſeſſio* is not now in uſe even in thoſe countries, where the civil law prevails: for, ſucceſſion by teſtament, or by law, comprehends every caſe. "Jus civile et prætorium hodie in unam conſo-"nantiam redactum eſt; ideoque hujus tituli "nullus amplius eſt uſus: etenim, qui aliis ex "teſtamento et ab inteſtato ſuccedunt, in uni-"verſum hæredes appellari ſolent." *Groenewegen, de legibus abrogatis. h. t.* In *England*, eſtates in general may be divided into two ſorts, *real* and *perſonal*; and ſucceſſions to theſe two different kinds of eſtates are governed by different rules of law. But it is neceſſary to premiſe, that by *real* eſtate is moſt commonly meant an eſtate in land in fee, *i. e.* deſcendible from a man to his heirs for ever: and that by *perſonal* eſtate are meant eſtates in land, determinable upon years, money in the funds or upon mortgages, plate, jewels, *&c.* and that ſuch *perſonal* eſtate is generally comprehended, in technical and artificial language, under the terms *goods* and *chattels*. Now in *real* eſtates there is no room for the *bonorum poſſeſſio* of the *Roman* law to take place in *England*; for all ſuch eſtates veſt in and deſcend inſtantly to the heir, at the death of his anceſtor; but in regard to *goods* and *chattels* the office of the ordinary or eccleſiaſtical judge ſeems to be ſimilar to that of the *Roman* prætor in granting the poſſeſſion of goods. For, when a man dies, who has diſpoſed of his perſonal eſtate by teſtament, the heirs or executors, appointed by that teſtament, muſt prove it before an eccleſiaſtical judge, who by granting probate gives the poſſeſſion of goods to the executors *ſecundum tabulas*, according to the will, or at leaſt confirms them in the poſſeſſion already taken. *Cowel, h. l.* And, when any perſon dies inteſtate, the ordinary (by virtue of 31 *Edw.* 3. chap. 11, and 21 *Henry* 8. chap. 5.) grants the poſſeſſion and adminiſtration of the inteſtate's goods to the widow or next of kin to ſuch inteſtate, or to both, at his diſcretion. And by the 22d and 23d of *Charles the ſecond*, cap. 10. it is enacted, "that all ordinaries and "eccleſiaſtical judges may call adminiſtra-"tors to an account and order DISTRIBUTION, "after debts and funeral expenſes are paid; to "wit, one third to the widow of the inteſtate, "and the reſidue among his children and thoſe "who legally repreſent them, if any of them "are dead: that, if there are no children, or "legal repreſentatives of them, one half of the "inteſtate's eſtate ſhall be allotted to the widow, "and the reſidue to the next of kindred to the "inteſtate in equal degree, and thoſe, who re-"preſent them: that no repreſentation ſhall be "admited among collaterals after brothers and "ſiſters children; and that, if there is no wife, "all ſhall be diſtributed among the children; "and, if no child, to the next of kin to the in-"teſtate in equal degree and their repreſenta-"tives." And by 1 *Jac.* 2. cap. 3d. it is enacted, "that, if a brother or ſiſter dies, each "brother and ſiſter, and their repreſentatives, "ſhall have an equal ſhare with the mother." From all which the analogy, between the *civil* law and the law of *England*, is very obſervable.

A noſtra conſtitutione.] This conſtitution is not extant.

Confirmandi gratia.] "Ob id certe, ut juſtius "poſſidere viderentur, qui autore prætore ad "ſucceſſionem perveniſſent; juſtior enim habe-"tur poſſeſſio, quam quis prætore nanciſcitur. "Præterea non poteſt non eſſe commodum plu-"res habere vias conſequendæ hæreditatis; quo-"niam, una repudiata, ſupereſt tamen altera; "ex quo facile colligitur, hanc prætoriam con-"firmationem, etſi neceſſaria non ſit, ſua tamen "utilitate non carere." *Mynſinger, h. l.*

Et alios complures gradus.] "Complures "gradus fecit prætor in bonorum poſſeſſionibus; "non eos ſolum, qui ſupra memorati ſunt, *unde* "*liberi*,

" *liberi, unde legitimi, unde cognati, ſecundum ta-*
" *bulas:* his enim addidit, *contra tabulas, unde*
" *decem perſonæ, tanquam ex familia, unde vir et*
" *uxor,* nunc confirmans, nunc ſupplens, nunc
" corrigens et impugnans jus civile." *Mynſingerus, h. l.*

De ſpeciebus ordinariis. Jus vetus.

§ I. Sunt autem bonorum poſſeſſiones ex teſtamento quidem hæ: prima, quæ præteritis liberis datur, vocaturque *contra tabulas*: ſecunda, quam omnibus jure ſcriptis hæredibus prætor pollicetur; ideoque vocatur *ſecundum tabulas*. Et, cum de teſtatis prius locutus eſt, ad inteſtatos tranſitum fecit. Et primo loco ſuis hæredibus, et iis, qui ex edicto prætoris inter ſuos hæredes connumerantur, dat bonorum poſſeſſionem, quæ vocatur *unde liberi*. Secundo, legitimis hæredibus. Tertio, decem perſonis, quas extraneo manumiſſori præferebat. Sunt autem decem perſonæ hæ; pater, mater, avus, avia, tam paterni quam materni; item filius, filia; nepos, neptis, tam ex filio, quam ex filia; frater ſororve, conſanguinei vel uterini. Quarto, cognatis proximis. Quinto, *tanquam ex familia*. Sexto, patrono patronæque, liberiſque eorum et parentibus. Septimo, viro et uxori. Octavo, cognatis manumiſſoris.

§ 1. *The kinds or ſpecies of the poſſeſſions of goods or prætorian ſucceſſions, when there is a teſtament, are the following. The firſt is that poſſeſſion, which is given to children, of whom no mention is made in the teſtament; and this is called* poſſeſſio contra tabulas; *i. e.* a poſſeſſion contrary to the teſtament. *The ſecond is that, which the prætor promiſes to all writen heirs, and it is therefore called* ſecundum tabulas; *i. e.* a poſſeſſion according to the teſtament. *Theſe being fixed, the prætor proceeded to the poſſeſſion of goods in regard to inteſtates;—— and firſt he gives the poſſeſſion of goods, called* unde liberi, *to the* proper heirs, *or to thoſe, who by the* prætorian edict *are numbered among the* proper heirs: —— *ſecondly, to the legitime heirs:—— thirdly, to ten perſons, in preference to a ſtranger, who was the* manumittor, *viz. to a father, a mother, or a grandfather or grand mother, paternal or maternal; to a ſon, a daughter, or to a grandſon or grand-daughter, as well by a daughter as by a ſon; to a brother or ſiſter, either conſanguine or uterine:—— fourthly, to the neareſt* cognates:—— *fifthly, to thoſe, who are,* as it were, *of the family,* tanquam ex familia: —— *ſixthly, to the patron or patroneſs, and to their children, and their parents:—— ſeventhly, to an huſband and wife:—— eighthly, to the* cognates *of a* manumittor *or patron.*

Extraneo manumiſſori.] " Extraneus manu-
" miſſor erat, qui non contracta fiducia eman-
" cipaſſet." *Mynſinger. h. l.*

Tanquam ex familia.] " Puto familiam ſig-
" nificari *patroni*; *i. e.* hac bonorum poſſeſſione
" vocari *patroni agnatos.*" *Vinn.*

Jus novum.

§ II. Sed eas quidem prætoria introduxit juriſdictio: a nobis tamen nihil incurioſum prætermiſſum eſt: ſed, noſtris conſtitutionibus omnia corrigentes, *contra tabulas* quidem *et ſecundum tabulas* bonorum poſſeſſiones admiſimus, utpote neceſſarias conſtitutas: nec non ab inteſtato, *unde liberi, et unde legitimi*, bonorum poſſeſſiones. Quæ autem in prætoris edicto quinto loco poſita fuerat, id eſt, *unde decem perſonæ*, eam pio propoſito

poſito et compendioſo ſermone ſupervacuam oſtendimus. Cum enim privata bonorum poſſeſſio decem perſonas præponebat extraneo manumiſſori, noſtra conſtitutio, quam de emancipatione liberorum fecimus, omnibus parentibus eiſdemque manumiſſoribus, contracta fiducia, manumiſſionem facere dedit; ut ipſa manumiſſio eorum hoc in ſe habeat privilegium, et ſupervacua fiat ſupradicta bonorum poſſeſſio. Sublata igitur prædicta quinta bonorum poſſeſſione in gradum ejus ſextam antea bonorum poſſeſſionem induximus, et quintam fecimus, quam prætor proximis cognatis pollicetur. Cumque antea fuerat ſeptimo loco bonorum poſſeſſio, *tanquam ex familia*, et octavo, *unde patroni patronæque, liberi et parentes eorum*, utramque per conſtitutionem noſtram, quam de jure patronatus fecimus, penitus evacuavimus. Cum enim ad ſimilitudinem ſucceſſionis ingenuorum libertinorum ſucceſſiones poſuerimus, quas uſque ad quintum gradum tantummodo coarctavimus, ut ſit aliqua inter ingenuos et libertinos differentia, ſufficit eis tam *contra tabulas* bonorum poſſeſſio, quam *unde legitimi*, et *unde cognati*, ex quibus poſſunt ſua jura vindicare, omni ſcrupuloſitate et inextricabili errore iſtarum duarum bonorum poſſeſſionum reſoluto. Aliam vero bonorum poſſeſſionem, quæ *unde vir et uxor* appellatur, et nono loco inter veteres bonorum poſſeſſiones poſita fuerat, et in ſuo vigore ſervavimus, et altiore loco, id eſt, ſexto, eam poſuimus: decima quoque veteri bonorum poſſeſſione, quæ erat *unde cognati manumiſſoris*, propter cauſas enumeratas merito ſublata, ut ſex tantummodo bonorum poſſeſſiones ordinariæ permaneant, ſuo vigore pollentes.

§ 2. *The prætor's authority hath introduced theſe ſucceſſions; but we, not ſuffering any uſeleſs inſtitution to continue in the law, have neverthleſs admited by our conſtitutions the poſſeſſion of goods* contra tabulas *and* ſecundum tabulas, *as neceſſary; and alſo the poſſeſſions of goods* ab inteſtato, *called* unde liberi *and* unde legitimi: *but we have briefly ſhewed, that the poſſeſſion, called* unde decem perſonæ, *which was ranked by the prætor's edict in the fifth order, was unneceſſary: for, whereas that poſſeſſion prefered ten kinds of perſons to a ſtranger, who was the manumittor at emancipation, our conſtitution, which regards emancipation, hath permited all parents to manumit their children, a* fiduciary *contract being preſumed; ſo that the poſſeſſion* unde decem perſonæ *is now uſeleſs. The afore-mentioned fifth poſſeſſion being thus abrogated, we have now made that the fifth, which was formerly the ſixth, by which the prætor gives the ſucceſſion to the neareſt* cognates. *And, whereas formerly the poſſeſſion of goods, called* tanquam ex familia, *was in the ſeventh place, and the poſſeſſion of goods called* unde patroni patronæque, liberi et parentes eorum, *was in the eighth, we have now annulled them both by our* ordinance *concerning the right of patronage. And having brought the ſucceſſions of the* libertini *to a ſimilitude with thoſe of the* ingenui, *(except, that we have limited the former to the fifth degree, ſo that there may ſtill remain ſome difference between them) we think, that the poſſeſſions* contra tabulas — unde legitimi — *and* unde cognati *may ſuffice, by which all perſons may vindicate their rights, the niceties and inextricable errors of thoſe two kinds of poſſeſſions,* tanquam ex familia *and* unde patroni, *being removed. The other poſſeſſion of goods, called* vir et uxor, *which held the ninth place among the antient poſſeſſions, we have preſerved in full force and have placed in an*

higher

higher degree, namely, the ſixth. The tenth of the antient poſſeſſions, called unde cognati manumiſſoris, *being deſervedly abrogated for cauſes already enumerated, there now remain only in force ſix ordinary poſſeſſions of goods.*

Noſtra conſtitutio.] *Cod.* 8. *t.* 49. *l. ult.* "Hæc "conſtitutio, quam de emancipationibus con- "ſcripſit imperator, omnibus parentibus et ma- "numiſſoribus præſumptionem contractæ fidu- "ciæ admiſit, ut ipſa emancipatio tacite id in "ſe habeat; merito igitur præfata bonorum "poſſeſſio pro ſupervacua habenda eſt, cum "extraneus poſthac manumiſſor nullus invenia- "tur. *Theoph.*

Per conſtitutionem noſtram.] "Hæc eſt ea "dem græca conſtitutio, cujus ſuperius quoque "aliquoties meminit imperator, et qua totam "ſe cauſam ſucceſſionis libertorum plene defini "viſſe teſtatur: non extat hæc conſtitutio, ſed "epitomen ejus nobis ex *Baſilicis* repræſenta "*Cujacius.*" lib. 20. obſ. 34.

Species extraordinaria.

§ III. Septima eas ſecuta, quam optima ratione prætores introduxerunt. Noviſſime enim promittitur edicto iis etiam bonorum poſſeſſio, quibus, ut detur, lege vel ſenatus-conſulto vel conſtitutione comprehenſum eſt: quam neque bonorum poſſeſſionibus, quæ ab inteſtato veniunt, neque iis, quæ ex teſtamento ſunt, prætor ſtabili jure connumeraverit: ſed quaſi ultimum et extraordinarium auxilium (prout res exigit) accommodavit, ſcilicet iis, qui ex legibus, ſenatus-conſultis, conſtitutionibuſve principum, ex novo jure, vel ex teſtamento, vel ab inteſtato veniunt.

§ 3. *But to theſe a ſeventh poſſeſſion hath been added, which the prætors have introduced with the greateſt reaſon: for, by edict, this poſſeſſion of goods is promiſed to all thoſe, to whom it is appointed to be given by any law, ſenatus-conſultum, or conſtitution: and the prætor hath not poſitively numbered this poſſeſſion of goods either with the poſſeſſions of the goods of inteſtate or teſtate perſons, but hath given it, according to the exigence of the caſe, as the laſt and extraordinary reſource of thoſe, who are called to the ſucceſſions of teſtates or inteſtates, by any particular law, any decree of the ſenate, or any new conſtitution.*

De ſucceſſorio edicto.

§ IV. Cum igitur plures ſpecies ſucceſſionum prætor introduxiſſet, eaſque per ordinem diſpoſuiſſet, et in unaquaque ſpecie ſucceſſionis ſæpe plures extent diſpari gradu perſonæ, ne actiones creditorum differentur, ſed haberent, quos convenirent, et ne facile in poſſeſſionem bonorum defuncti mitterentur, et eo modo ſibi conſulerent, ideo petendæ bonorum poſſeſſioni certum tempus præfinivit. Liberis itaque et parentibus, tam naturalibus quam adoptivis, in petenda bonorum poſſeſſione anni ſpatium, cæteris autem (agnatis vel cognatis) centum dierum, dedit.

§ 4. *The prætor, having introduced many kinds of ſucceſſions and ranked them in order, hath thought proper, inaſmuch as many perſons of different degrees are often found in one ſpecies of ſucceſſion, to limit a certain time for demanding the poſſeſſion of goods, to the intent, that the actions of creditors may not be delayed for want of a proper perſon, againſt whom to bring them, and that the creditors themſelves may not obtain the poſſeſſion of the effects of the deceaſed too eaſily, and ſo conſult ſolely their own advantage: therefore to parents and children, whether natural or adopted, the prætor hath given the ſpace of one year, in which they may either accept or refuſe*

the poſſeſſion of goods. But to all other perſons, agnates *or* cognates, *he allows only an hundred days.*

Certum tempus.] See *Digeſt.* 38. title 9. *de ſucceſſorio edicto.* ULPIAN.

De jure accreſcendi et iterum de ſucceſſorio edicto.

§ V. Et, ſi intra hoc tempus aliquis bonorum poſſeſſionem non petierit, ejuſdem gradus perſonis accreſcit, vel, ſi nullus ſit, deinceps cæteris bonorum poſſeſſionem perinde ex ſucceſſorio edicto pollicetur, ac ſi is, qui præcedebat, ex eo numero non eſſet. Si quis itaque delatam ſibi bonorum poſſeſſionem repudiaverit, non, quouſque tempus bonorum poſſeſſioni præfinitum exceſſerit, expectatur; ſed ſtatim cæteri ex eodem edicto admittuntur.

§ 5. *And, if any perſon intituled does not claim the poſſeſſion of goods within the time limited, his right of poſſeſſion accrues firſt to thoſe in the ſame degree with himſelf; and, in default of perſons in the ſame degree, then the prætor by the* ſucceſſory edict *beſtows the poſſeſſion of goods upon thoſe in the next degree, as if he, who preceded, had no right. And, if any man refuſes the poſſeſſion of goods, when it is open to him, there is no neceſſity to wait, 'till the time limited is expired, but thoſe, who are the next in ſucceſſion, may be inſtantly admited by virtue of the before-mentioned* edict.

Ex ſucceſſorio edicto.] *vid.* ff. 38. t. 9.

Explicatio dicti temporis.

§ VI. In petenda autem bonorum poſſeſſione dies utiles ſinguli conſiderantur.

§ 6. *It is here to be obſerved, that in regard to the time preſcribed for demanding the poſſeſſion of goods, we count all the days, which are* utiles; *i. e. thoſe days, on which the party, having knowledge that the inheritance is open to him, might apply to the judge.*

Dies utiles.] "Dies in jure noſtro alii ſunt "continui, alii utiles. Continui, qui ſine in- "terruptione, nulliſque exceptis, currunt: uti- "les ſunt illi duntaxat, quibus experiundi ſui "juris poteſtas eſt; et hi neque ignoranti, ne- "que agere non valenti, currunt. *ff.* 44. *t.* 3. *l.* 1. *Vinn. Theoph. h. t.*

Quomodo peti debet.

§ VII. Sed bene anteriores principes et huic cauſæ proviserunt, ne quis pro petenda bonorum poſſeſſione curet; ſed, quocunque modo admittentis eam indicium oſtenderit, intra ſtatuta tamen tempora, plenum habeat earum beneficium.

§ 7. *The emperors, our predeceſſors, have wiſely provided in this caſe, that no perſon need be ſolicitous to demand the poſſeſſion of goods in ſolemn form: for, if by any act it manifeſtly appears, that a man has in any manner conſented to accept the* prætorian ſucceſſion *within the preſcribed time, he ſhall enjoy the full benefit of it.*

TITU-

TITULUS UNDECIMUS.

De acquisitione per arrogationem.

Continuatio.

EST et alterius generis per universitatem successio: quæ neque lege duodecim tabularum, neque prætoris edicto, sed eo jure, quod consensu receptum est, introducta est.

There is also an universal succession of another kind, which was introduced neither by the laws of the twelve tables, nor by the edict of the prætor, but by that law, which takes it's rise from general consent and usage.

Quæ hoc modo acquiruntur. Jus vetus.

§ I. Ecce enim, cum pater-familias sese in arrogationem dat, omnes res ejus corporales et incorporales, quæque ei debitæ sunt, arrogatori antea quidem pleno jure acquirebantur, exceptis iis, quæ per capitis diminutionem pereunt; quales sunt operarum obligationes et jus agnationis: usus etenim et ususfructus licet his antea connumerabantur; attamen capitis diminutione minima eos tolli prohibuit nostra constitutio.

§ 1. *For example, if the father of a family gave himself in arrogation, all things, which appertained to him, whether corporeal or incorporeal, and whatever was due to him, became antiently the property of the* arrogator, *those things only excepted, which perished by* diminution *or change of state; as the duties of freed-men to their patrons and the rights of* agnation. *But, altho' use and usufruct were heretofore numbered among those rights, which perished by diminution, yet our constitution hath prohibited, that the use and usufruct of things should be taken away by the* least diminution *or change of state.*

Prohibuit nostra constitutio.] *vid. Cod. 3. t. 33. l. 16. de usufructu.*

Jus novum.

§ II. Nunc autem nos eandem acquisitionem, quæ per arrogationem fiebat, coarctavimus ad similitudinem naturalium parentum. Nihil enim aliud, nisi tantummodo ususfructus, tam naturalibus parentibus quam adoptivis, per filios-familias acquiritur in iis rebus, quæ extrinsecus filiis obveniunt, dominio eis integro servato. Mortuo autem filio arrogato in adoptiva familia, etiam dominium rerum ejus ad arrogatorem pertransit: nisi superstint aliæ personæ, quæ ex constitutione nostra patrem in iis, quæ acquiri non possunt, antecedant.

§ 2. *But we have now limited the acquisitions obtained by arrogation, in similitude of what is gained by natural parents: for nothing is now acquired either by natural or adoptive parents, but the bare usufruct of those things, which their children possess adventitiously and extrinsically in their own right, the property still remaining*

maining intire in the adopted or natural child. But, if an arrogated ſon dies under the power of his arrogator, then even the property *of the effects of ſuch ſon will paſs to the* arrogator *in default of thoſe perſons, whom we have by our conſtitution prefered to the father in the ſucceſſion of thoſe things, which could not be acquired for him.*

Quæ ex conſtitutione noſtra.] *vid. Cod. 6. t. 59. l. ult. Communia de ſucceſſionibus.*

Effectus hujus acquiſitionis.

§ III. Sed ex diverſo pro eo, quod is debuit, qui ſe in adoptionem dedit, ipſo quidem jure arrogator non tenetur, ſed nomine filii convenitur: et, ſi noluerit eum defendere, permittitur creditoribus, per competentes noſtros magiſtratus, bona, quæ ejus cum uſufructu futura fuiſſent, ſi ſe alieno juri non ſubjeciſſet, poſſidere, et legitimo modo ea diſponere.

§ 3. *On the contrary an* arrogator *is not bound at law to ſatisfy the debts of his adopted ſon in conſequence of a direct action; but yet he may be convened in his ſon's name, and, if he refuſes to defend his ſon, then the creditors, by order of the proper magiſtrate, may ſeize upon and legally ſell all thoſe goods, of which the uſufruct, as well as the property, would both have been in the debtor, if he had not made himſelf ſubject to the power of another.*

TITULUS DUODECIMUS.

De eo, cui libertatis cauſa bona addicuntur.

Continuatio.

ACCESSIT novus caſus ſucceſſionis ex conſtitutione Divi Marci. Nam, ſi ii, qui libertatem acceperunt a domino in teſtamento, ex quo non aditur hæreditas, velint bona ſibi addici libertatum conſervandarum cauſa, audiuntur.

A new ſpecies of ſucceſſion hath taken it's riſe from the conſtitution of Marcus Aurelius. *For, if thoſe ſlaves, to whom freedom hath been bequeathed, are deſirous, for the ſake of obtaining it, that the inheritance, which hath not been accepted by the writen heir, ſhould be adjudged to them, they ſhall obtain their requeſt.*

Reſcriptum D. Marci.

§ I. Et ita Divi Marci reſcripto ad Pompilium Rufum continetur: verba reſcripti ita ſe habent. *Si Virginio Valenti, qui teſtamento ſuo libertatem quibuſdam adſcripſit, nemine ſucceſſore ab inteſtato exiſtente, in ea cauſa bona ejus eſſe cæperunt, ut vænire debeant, is, cujus de ea re notio eſt,*

aditus

aditus rationem deſiderii tui habebit, ut libertatum, tam earum, quæ directo, quam earum, quæ per ſpeciem fideicommiſſi relictæ ſunt, tuendarum gratia addicantur tibi, ſi idonee creditoribus caveris de ſolido, quod cuique debetur, ſolvendo. Et ii quidem, quibus directa libertas data eſt, perinde liberi erunt, ac ſi hæreditas adita eſſet: ii autem, quos hæres manumittere rogatus eſt, a te libertatem conſequentur; ita autem ut ſi non alia conditione velis tibi bona addici, quam ut ii etiam, qui directo libertatem acceperunt, tui liberti fiant: nam huic etiam voluntati tuæ, ſi ii, quorum de ſtatu agitur, conſentiant, auctoritatem noſtram accommodamus. Et, ne hujus reſcriptionis noſtræ emolumentum alia ratione irritum fiat, ſi fiſcus bona agnoſcere voluerit, et ii, qui bonis noſtris attendunt, ſciant, commodo pecuniario præferendam eſſe libertatis cauſam, et ita bona cogenda, ut libertas eis ſalva ſit, qui eam adipiſci potuerunt, ac ſi hæreditas ex teſtamento adita eſſet.

§ 1. *And to the ſame effect is the reſcript of the* emperor Marcus *to* Pompilius Rufus; *the words of which are theſe.* "If the eſtate of *Virginius Valens*, who "by teſtament hath bequeathed to certain perſons their freedom, muſt neceſſa- "rily be ſold, and there is no ſucceſſor *ab inteſtato*, then the *magiſtrate*, who "has the cognizance of theſe affairs, ſhall upon application hear the merits "of your cauſe, that, for the ſake of preſerving the liberty of thoſe, to whom "it was given, either directly or in truſt, the eſtate of the deceaſed may be ad- "judged to you, on condition, that you give good ſecurity to the creditors, "to pay them the whole of their juſt demands. And all thoſe, to whom free- "dom was *directly* given, ſhall then become free, as if the inheritance had been "entered upon by the writen heir; but thoſe, whom the heir was ordered to "manumit, ſhall obtain their freedom from you only. And, if you are not "willing, that the goods of the deceaſed ſhould be adjudged to you on any "other condition, than that even they, who received their liberty *directly* by "teſtament, ſhall alſo become your freed-men, we then order, that your will "ſhall be complied with, if the perſons agree to it, who are to receive their "freedom. And, leſt the uſe and emolument of this our *reſcript* ſhould be "fruſtrated by any other means, be it known to the officers of our revenue, "that, whenever our exchequer lays claim to the eſtate of a deceaſed perſon, "the cauſe of liberty is to be prefered to any pecuniary advantage; and that "the eſtate ſhall be ſo ſeized, as to preſerve the freedom of thoſe, who could "otherwiſe have obtained it: and this in as full a manner, as if the inheritance "had been entered upon by the teſtamentary heir."

Utilitas reſcripti.

§ II. Hoc reſcripto ſubventum eſt et libertatibus et defunctis, ne bona eorum a creditoribus poſſideantur et væneant. Certe, ſi fuerint hac de cauſa bona addicta, ceſſat bonorum venditio: exiſtit enim defuncti defenſor, et quidem idoneus, qui de ſolido creditoribus cavet.

§ 2. *The contents of this* reſcript *are calculated not only in favor of liberty, but alſo for the benefit of deceaſed perſons, leſt their effects ſhould be ſeized and ſold by their creditors: for it is certain, that, when goods are adjudged to a particular man for the preſervation of liberty, a ſale by creditors can never take effect*

effect. For he, to whom the goods are adjudged, is the protector of the deceased, and must always be a person, who can give security for the full payment of creditors.

Ubi locum habeat.

§ III. In primis hoc rescriptum toties locum habet, quoties testamento libertates datæ sunt. Quid ergo si quis intestatus decedens codicillis libertates dederit, neque adita sit ab intestato hæreditas? Favor constitutionis debebit locum habere: certe, si testatus decesserit et codicillis dederit libertatem, competere eam, nemini dubium est.

§ 3. *This* rescript *takes place, whenever freedom is confered by testament. But, when a master dies intestate, having bequeathed freedom to his slaves by codicil, and his inheritance is not entered upon, what will then be the consequence? We answer, that the favor of the* rescript *shall extend to this case; but it is most certainly not to be doubted, that, if a master dies testate and by codicil bequeaths freedom, the* rescript *shall be of full force.*

§ IV. Tunc enim constitutioni locum esse verba ostendunt, cum nemo successor ab intestato existat. Ergo, quamdiu incertum erit, utrum existat, an non, cessabit constitutio. Si vero certum esse cœperit, neminem existere; tunc erit constitutioni locus.

§ 4. *The words of the* rescript *shew, that it is then in force, when there is absolutely no successor* ab intestato. *It therefore follows, that, as long as it remains doubtful, whether there is or is not a successor, the constitution shall not take place: but, when once it is certain, that no one will enter upon the succession, the* ordinance *shall then have it's effect.*

§ V. Si is, qui in integrum restitui potest, abstinuerit hæreditate, an quamvis potest in integrum restitui, potest admitti constitutio, et bonorum addictio fieri? Quid ergo, si post addictionem, libertatum conservandarum causa factam, in integrum sit restitutus? Utique non erit dicendum, revocari libertates: quia semel competierunt.

§ 5. *But, if he, who has a right to be restored* in integrum *(as a minor for example) should delay to take upon him the inheritance of his father, it may then be asked, whether, notwithstanding this right of being restored, the constitution shall take place, and an adjudication of the goods pass to a stranger, or one of the slaves? And again, it may be demanded, what will be the consequence, if, after an adjudication has been made for the sake of liberty, the heir should be restored* in integrum? *We answer, that freedom, when once obtained, shall not afterwards be revoked.*

Si libertates datæ non sunt.

§ VI. Hæc constitutio libertatum tuendarum causa introducta est. Ergo, si libertates nullæ sint datæ, cessat constitutio. Quid ergo, si vivus dederit libertates vel mortis causa, et, ne de hoc quæratur, utrum in fraudem creditorum, an non, factum sit, idcirco velint sibi bona addici, an audiendi sunt? Et magis est, ut audiri debeant, etsi deficiant verba constitutionis.

§ 6.

§ 6. *This conſtitution was made for the protection of liberty; and therefore, when freedom is not given, the conſtitution has no effect. Suppoſe then, that a maſter hath given freedom to his ſlaves either* inter vivos, *or* mortis cauſa, *and that they, to prevent the creditors from complaining, that this was done to defraud them, ſhould petition, that the eſtate of the deceaſed may be adjudged to them; are theſe perſons to be heared? we anſwer, that we incline to grant their requeſt, altho' in this caſe, the letter of the conſtitution is deficient.*

De ſpeciebus additis a Juſtiniano.

§ VII. Sed, cum multas diviſiones ejuſmodi conſtitutioni deeſſe perſpeximus, lata eſt a nobis pleniſſima conſtitutio, in qua multæ ſpecies collatæ ſunt, quibus jus hujuſmodi ſucceſſionis pleniſſimum eſt effectum; quas ex ipſius lectione conſtitutionis poteſt quis cognoſcere.

§ 7. *But perceiving, that the* reſcript *was deficient in many reſpects, we enacted a moſt expreſs conſtitution, containing many caſes, which explain the rights of ſucceſſion in the fulleſt manner, of which every perſon, who reads that conſtitution, will be ſenſible.*

Pleniſſima conſtitutio.] *vid. Cod. 7. t. 2. l. 15.*

TITULUS DECIMUS-TERTIUS.

De ſucceſſionibus ſublatis, quæ fiebant per bonorum venditiones, et ex ſenatus-conſulto Claudiano.

C. vii. T. 24.

ERANT ante prædictam ſucceſſionem olim et aliæ per univerſitatem ſucceſſiones: qualis fuerat bonorum emptio, quæ de bonis debitoris vendendis per multas ambages fuerat introducta; et tunc locum habebat, quando judicia ordinaria in uſu fuerant: ſed, cum extraordinariis judiciis poſteritas uſa eſt, ideo cum ipſis ordinariis judiciis etiam bonorum venditiones expiraverunt: et tantummodo creditoribus datur officio judicis bona poſſidere, et, prout utile eis viſum eſt, ea diſponere: quod ex latioribus digeſtorum libris perfectius apparebit. Erat et ex ſenatus-conſulto Claudiano miſerabilis per univerſitatem acquiſitio, cum libera mulier, ſervili amore bacchata, ipſam libertatem per ſenatus-conſultum amittebat, et cum libertate ſubſtantiam. Quod indignum noſtris temporibus eſſe exiſtimantes et a noſtra civitate deleri, et non inſeri noſtris digeſtis conceſſimus.

There were many other kinds of univerſal ſucceſſions before that, which we treated of in the foregoing title: as the bonorum emptio, *which was firſt introduced, that the*

the eſtates of debtors might be ſold; but this was accompanied by many intricate and tedious proceedings; it continued nevertheleſs as long as the ordinary judgments were in practice; but, as ſoon as the extraordinary judgments were made uſe of, the ſolemn emptio bonorum *ceaſed at the ſame time with the ordinary judgments. And creditors can now poſſeſs themſelves of the goods of their debtors and diſpoſe of them, as they think moſt proper, by the decree of a judge. But theſe points are treated of more perfectly and at large in the books of our digeſts. There was alſo, by virtue of the* Claudian *decree, another univerſal acquiſition called* miſerabilis: *for example, if a free-woman had debaſed herſelf by being inamoured of a ſlave, ſhe loſt her freedom by the before named decree, and, together with her freedom, her eſtate and ſubſtance. But, it being our opinion, that this part of the decree was unworthy of our reign, and ought therefore to be expunged from our laws, we have not permited it to be inſerted in the digeſts.*

Qualis fuerat bonorum emptio.] "Bona debitoris, poſtquam aliquandiu celeberrimis in "locis proſcripta pependiſſent, ex edicto poſſideri jubebantur; deinde magiſter poſtulabatur "et creabatur, per quem diſtrahebantur et "emptori addicebantur, qui omnibus in ſolidum ſatisfaciebat: aut, antequam emeret, "cum creditoribus de certa parte decidebat." *vid.* Theophilum *in hunc locum, et* Heineccii *antiq. Rom. jur. lib. 2. tit. 17.* This exact ſpecies of ſale is not in uſe in *England*; but there is a ſale not very unlike it in the caſe of bankrupts, whoſe eſtates and goods are ſold and divided among their creditors by commiſſioners, appointed for that purpoſe. *vid.* 13 *Eliz. cap.* 7. 1 *Jac.* 1. *cap.* 15. 21 *Jac.* 1. *cap.* 19. 10 *Ann. cap.* 15. 7 *Geo.* 1. *cap.* 31. 5 *Geo.* 2. *cap.* 20.

Ex latioribus digeſtorum libris.] *D.* 42. *t.* 5. *De rebus auctoritate judicis poſſidendis. D.* 42. *t.* 4. *Quibus ex cauſis in poſſeſſionem eatur.*

Quod indignum noſtris temporibus.] *vid. Cod.* 7. *t.* 24. *De ſenatus-conſulto* Claudiano *tollendo.*

TITULUS DECIMUS-QUARTUS.

De obligationibus.

D. xliv. T. 7. C. iv. T. 10.

Continuatio et definitio.

NUNC tranſeamus ad obligationes. Obligatio eſt juris vinculum, quo neceſſitate adſtringimur alicujus rei ſolvendæ ſecundum noſtræ civitatis jura.

Let us now paſs to obligations. An obligation is the chain of the law, by which we are neceſſarily bound to make ſome payment, according to the laws of our country.

Diviſio prior.

§ I. Omnium autem obligationum ſumma diviſio in duo genera deducitur: namque aut civiles ſunt aut prætoriæ. Civiles ſunt, quæ aut legibus conſtitutæ aut certo jure civili comprobatæ ſunt. Prætoriæ ſunt, quas prætor ex ſua juriſdictione conſtituit; quæ etiam honorariæ vocantur.

§ 1. *Obligations are primarily divided into two kinds,* civil *and* prætorian. Civil *obligations are thoſe, which are conſtituted by the laws, or by any ſpecies of the*

the civil law. Prætorian *obligations are thoſe, which the prætor hath appointed by his authority; and theſe are alſo called* honorary.

Diviſio poſterior.

§ II. Sequens diviſio in quatuor ſpecies dividitur. Aut enim ex contractu ſunt, aut quaſi ex contractu, aut ex maleficio, aut quaſi ex maleficio. Prius eſt, ut de iis, quæ ex contractu ſunt, diſpiciamus. Harum æque quatuor ſunt ſpecies. Aut enim re contrahuntur, aut verbis, aut literis, aut conſenſu: de quibus ſingulis diſpiciamus.

§ 2. *The ſecond or ſubſequent diviſion of obligations contains four ſpecies: for ſome obligations ariſe by* contract, *others by* quaſi-contract; *ſome by* malefeaſance, *and others by* quaſi-malefeaſance. *We muſt firſt treat of thoſe obligations, which ariſe from a* contract; *and of theſe there are alſo four kinds: for obligations are contracted by the thing itſelf, by word of mouth, by writing, or by the mere conſent of parties. Let us now take a ſeparate view of each of theſe methods of contracting.*

TITULUS DECIMUS-QUINTUS.

Quibus modis re contrahitur obligatio.

D. xii. T. 1. D. xiii. T. 6. 7. C. iv. T. 1. 23. 24. 34.

De mutuo.

RE contrahitur obligatio, veluti mutui datione. Mutui autem datio in iis rebus conſiſtit, quæ pondere, numero, menſurave, conſtant; veluti vino, oleo, frumento, pecunia numerata, ære, argento, auro, quas res, aut numerando, aut metiendo, aut appendendo, in hoc damus, ut accipientium fiant. Et, quoniam nobis non eædem res ſed aliæ ejuſdem naturæ et qualitatis redduntur, inde etiam mutuum appellatum eſt: quia ita a me tibi datur, ut ex meo tuum fiat: & ex eo contractu naſcitur actio, quæ vocatur *certi condictio.*

An obligation is contracted by the thing itſelf; that is, by the delivery of it, as a loan or mutuum: *and any particular thing, which conſiſts of weight, number, or meaſure, as wine, oil, corn, coin, braſs, ſilver, gold, may be delivered as a* mutuum; *and theſe ſubſtances, when ſo delivered, become in ſpecie the abſolute property of the receiver: and, ſince the very identical things lent cannot be reſtored, but others of the ſame nature and quality muſt be paid in lieu of them, this loan is therefore called a* mutuum; *for in this caſe* I ſo give, that what is mine may become yours: ut ex MEO TUUM fiat. *From this contract ariſes that action, which is called* certi condictio.

De indebito ſoluto.

§ I. Is quoque, qui non debitum accepit ab eo, qui per errorem ſolvit, re obligatur, daturque agenti contra eum propter repetitionem condictitia actio: nam perinde ei condici poteſt, *ſi apparet, eum dare oportere*, ac ſi mutuum accepiſſet. Unde pupillus, ſi ei ſine tutoris auctoritate indebitum per errorem datum eſt, non tenebitur indebiti condictione, non magis quam mutui datione. Sed hæc ſpecies obligationis non videtur ex contractu conſiſtere; cum is, qui ſolvendi animo dat, magis voluerit negotium diſtrahere, quam contrahere.

§. 1. *He alſo, who hath received what was not due to him, it being paid or delivered by miſtake, is bound by the thing received, ſo that an action of condiction lies againſt him for the recovery of the thing, at the ſuit of him, who paid or delivered it erroneouſly. And this action may be brought againſt the receiver in theſe words,* ſi apparet, eum dare opportere; *in the ſame manner, as if he had accepted the thing delivered, as a* mutuum. *And hence it is, that a pupil, when a payment of any thing not due hath been made to him without the authority of his* tutor, *is not ſubject to the action called* condictio indebiti; *becauſe he is not ſubject to an action on account of the delivery of a thing, as a* mutuum. *And yet this ſpecies of obligation does not ſeem to proceed from a contract; ſince he, who pays with an intention to ſatisfy his debts, appears more willing to diſſolve, than to make, a contract.*

De commodato.

§. II. Item is, cui res aliqua utenda datur, id eſt, commodatur, re obligatur, & tenetur commodati actione. Sed is ab eo, qui mutuum accepit, longe diſtat: namque non ita res datur, ut ejus fiat; & ob id de ea re ipſa reſtituenda tenetur. Et is quidem, qui mutuum accepit, ſi quolibet fortuito caſu amiſerit, quod accepit, veluti incendio, ruina, naufragio, aut latronum hoſtiumve incurſu, nihilominus obligatus manet. At is, qui utendum accepit, ſane quidem exactam diligentiam cuſtodiendæ rei præſtare tenetur: nec ſufficit ei, tantam diligentiam adhibuiſſe, quantam ſuis rebus adhibere ſolitus eſt, ſi modo alius diligentior poterat eam rem cuſtodire. Sed propter majorem vim, majoreſve caſus, non tenetur, ſi modo non ipſius culpa is caſus intervenerit: alioqui ſi id, quod tibi commodatum eſt domi, peregre tecum ferre malueris, & vel incurſu hoſtium prædonumve, vel naufragio, amiſeris, dubium non eſt, quin de reſtituenda ea re tenearis. Commodata autem res tunc proprie intelligitur, ſi, nulla mercede accepta vel conſtituta, res tibi utenda data eſt: alioqui, mercede interveniente, locatus tibi uſus rei videtur: gratuitum enim debet eſſe commodatum.

§. 2. *He alſo, to whom the uſe of any particular thing is granted or* commodated, *is bound by the delivery of the thing, and is ſubject to an action called* commodataria. *But ſuch perſon widely differs from him, who hath received a* mutuum: *for a* commodatum, *or thing lent, is not delivered, to the intent that it ſhould become the property of the receiver; and therefore he is bound to reſtore the identical*

identical thing, which he hath received. There is alſo another difference; for he, who hath accepted a mutuum, *is not freed from his obligation, if even by any accident, as by the fall of an edifice, fire, ſhipwreck, thieves, or the incurſions of an enemy, he hath loſt what he hath received: but he, who hath received a* commodatum, *or a thing lent for his uſe only, is indeed commanded to employ his utmoſt diligence in keeping and preſerving it; (and it will not ſuffice, that he hath taken the ſame care of it, which he was accuſtomed to take of his own property, if it appears, that a more diligent man might have preſerved it;) yet, if it is evident, that the loſs of it was occaſioned by a ſuperior force, or ſome extraordinary accident, and not by any fault, he is then not obliged to make good the loſs; but, if a man by choice will travel with what he has received as a* commodatum *or loan, and ſhould loſe it by ſhipwreck, or by the incurſion of enemies, or robbers, it is not to be doubted, but that he is bound to make reſtitution, or to pay an equivalent. A thing is properly ſaid to be lent or* commodated, *when one man permits another to enjoy the uſe of it, and receives nothing by way of hire: but, if a price for hire is paid, the thing is* let, *and not* lent; *for a* commodatum, *or loan, muſt be gratuitous.*

De depoſito.

§. III. Præterea & is, apud quem res aliqua deponitur, re obligatur, teneturque actione depoſiti: quia & ipſe de ea re, quam accepit, reſtituenda tenetur. Sed is ex eo ſolo tenetur, ſi quid dolo commiſerit: culpæ autem nomine, id eſt, deſidiæ ac negligentiæ, non tenetur. Itaque ſecurus eſt, qui parum diligenter cuſtoditam rem furto amiſerit: quia, qui negligenti amico rem cuſtodiendam tradit, non ei, ſed ſuæ facilitati, id imputare debet.

§. 3. *Any perſon, who is intruſted with a depoſite, is bound by the delivery of the thing, and is ſubject to an action of depoſite, becauſe he is under an obligation of making reſtitution of that very thing, which he received. But a depoſitary is only thus anſwerable on account of fraud; for where a fault only can be proved againſt him, ſuch as negligence, he is under no obligation; and he is therefore ſecure, if the thing depoſited is ſtolen from him, even altho' it was carelеſly kept. For he, who commits his goods to the care of a negligent friend, ſhould impute the loſs of them, not to his friend, but to his own facility and want of caution.*

De pignore.

§. IV. Creditor quoque, qui pignus accepit, re obligatur: quia & ipſe, de ea re, quam accepit, reſtituenda, tenetur actione pignoratitia. Sed, quia pignus utriuſque gratia datur, & debitoris, quo magis pecunia ei credatur, & creditoris, quo magis ei in tuto ſit creditum, placuit ſufficere, ſi, ad eam rem cuſtodiendam, exactam diligentiam adhibeat; quam ſi præſtiterit, & aliquo fortuito caſu rem amiſerit, ſecurum eſſe, nec impediri creditum petere.

§. 4. *A creditor alſo, who hath received a pledge, is bound by the delivery of it; for he is obliged to reſtore the very thing, which he hath received, by the action called* pignoratitia. *But, inaſmuch as a pledge is given for the mutual*

ſervice

ſervice of both debtor and creditor, (of the debtor, that he may obtain the money the more eaſily, and of the creditor, that the repayment may be the better ſecured,) it will ſuffice, if the creditor ſhall appear to have uſed an exact diligence in keeping the thing pledged: for, if ſuch diligence appears to have been uſed, and the pledge was loſt by mere accident, the law ſecures the creditor, as to the loſs of the thing pledged, and he is by no means impeded to ſue his debt.

TITULUS DECIMUS-SEXTUS.

De verborum obligationibus.

D. xlv. T. 1. C. viii. T. 38.

Summa.

VERBIS obligatio contrahitur ex interrogatione et reſponſione, cum quid dari fierive nobis ſtipulamur: ex qua duæ proficiſcuntur actiones, tam condictio certi, ſi certa ſit ſtipulatio, quam ex ſtipulatu, ſi incerta ſit: quæ hoc nomine inde utitur, quod ſtipulum apud veteres firmum appellabatur, forte a ſtipite deſcendens.

An obligation in words is made by queſtion and anſwer, when we ſtipulate, that any thing ſhall be given or done; and from hence ariſe two actions, viz. the action called condictio certi, *when the ſtipulation is certain; and the action called* condictio ex ſtipulatu, *when the ſtipulation is incertain. This obligation is called a ſtipulation, becauſe whatever was firm was termed* ſtipulum *by the antients; the word* ſtipulum *being probably derived from* ſtipes, *denoting the trunk of a tree.*

De verbis ſtipulationum.

§. I. In hac olim talia verba tradita fuerunt; *Spondes? Spondeo. Promittis? Promitto. Fidepromittis? Fidepromitto. Fidejubes? Fidejubeo. Dabis? Dabo. Facies? Faciam.* Utrum autem Latina an Græca, vel qualibet alia, lingua ſtipulatio concipiatur, nihil intereſt: ſcilicet, ſi uterque ſtipulantium intellectum ejus linguæ habeat: nec neceſſe eſt eadem lingua utrumque uti, ſed ſufficit congruenter ad interrogata reſpondere. Quinetiam duo Græci Latina lingua contrahere obligationem poſſunt. Sed hæc ſolemnia verba olim quidem in uſu fuerunt: poſtea autem Leonina conſtitutio lata eſt, quæ, ſolemnitate verborum ſublata, ſenſum et conſonantem intellectum ab utraque parte ſolum deſiderat, quibuscumque tandem verbis expreſſum eſt.

§. 1. *The following words were formerly uſed in all verbal obligations.*

Spondes? Spondeo.
Promittis? Promitto.
Fide-promittis? Fide-promitto.
Fide-jubes? Fide-jubeo.

Dabis?

Dabis? Dabo.
Facies? Faciam.

And it is not material, whether the ſtipulation is conceived in Latin, Greek, or any other language, if the ſtipulating parties underſtand it: neither is it neceſſary, that the ſame language ſhould be uſed by each perſon; for it is ſufficient, if a congruent pertinent anſwer is made to each queſtion. It is moreover certain, that two Greeks may contract in Latin. Antiently indeed it was neceſſary to uſe thoſe ſolemn words before recited; but the conſtitution of the Emperor Leo *was afterwards enacted, which takes away this verbal ſolemnity, and requires only the apprehenſion and conſent of each party, expreſſed in any form of words.*

Leonina conſtitutio.] *Omnes ſtipulationes, etiamſi non ſolennibus, vel directis, ſed quibuscunque verbis, conſenſu contrahentium compoſitæ ſunt, vel legibus cognitæ, ſuam habeant firmitatem.* Cod. 8 t. 38. l. 10.

Quibus modis ſtipulatio fit. De ſtipulatione pura vel in diem.

§ II. Omnis ſtipulatio aut pure, aut in diem, aut ſub conditione fit. Pure, veluti *quinque* AUREOS *dare ſpondes?* Idque confeſtim peti poteſt. In diem, cum adjecto die, quo pecunia ſolvatur, ſtipulatio fit; veluti, *decem* AUREOS *primis calendis Martiis dare ſpondes?* Id autem, quod in diem ſtipulamur, ſtatim quidem debetur: ſed peti prius, quam dies venerit, non poteſt: ac ne eo quidem ipſo die, in quem ſtipulatio facta eſt, peti poteſt: quia totus is dies arbitrio ſolventis tribui debet; neque enim certum eſt, eo die, in quem promiſſum eſt, datum non eſſe, priuſquam is dies præterierit.

§ 2. *Every ſtipulation is made to be performed* ſimply, *or at a* day certain, *or* conditionally. *A ſtipulation is made to be performed* ſimply, *when a man ſays,* do you promiſe to pay me five AUREI? *And, in this caſe, the money may be inſtantly demanded. A ſtipulation is made to be performed* at a day certain, *when the day is added, on which the money is to be paid: as when a man ſays,* do you promiſe to pay me ten AUREI on the firſt of March? *but note, that what we ſtipulate to pay at a* day certain, *tho' it becomes immediately due, yet it cannot be demanded before the day comes; nor can it even* then *be ſued; for the whole day muſt be allowed for payment; becauſe it can never be certain, that there hath been a failure of payment on the day promiſed, until that day is quite expired.*

De die adjecto perimendæ obligationis cauſa.

§ III. At, ſi ita ſtipuleris, *decem* AUREOS *annuos, quoad vivam, dare ſpondes?* et pure facta obligatio intelligitur, et perpetuatur: quia ad tempus non poteſt deberi: ſed hæres petendo pacti exceptione ſubmovebitur.

§ 3 *But, if a man thus ſtipulates; viz.* do you promiſe to give me ten AUREI annually, as long as I live? *the obligation is underſtood to be made purely or ſimply, and becomes perpetual ſo as to bind the heirs of the obligor; for an obligation cannot continue due for a time certain only: yet, if the heir of the ſtipulator demands payment, he ſhall be barred by an exception of agreement.*

Quia

Quia ad tempus.] " Quod alicui deberi cœ-
" pit, id certis modis deberi definit, puta
" ſolutione, acceptilatione, novatione, &c.
" *ff.* 44. *t.* 7. *l.* 44. *Ulp.* Sed tempus non eſt
" modus tollendæ obligationis, cum tempus ſit
" quidpiam naturale, et obligatio civile quid-
" dam; naturalia autem non poſſunt tollere
" civilia, ſed ſunt alii modi a legibus præ-
" ſcripti, quibus extinguitur obligatio. Cum
" ergo tempus non poſſit tollere civilem obli-
" gationem, ſequitur te hæredi meo remanere
" obligatum civiliter, etiam me mortuo; idque
" textus ſentit in verbo, *perpetuatur*. Hæc
" quidem ſubtili ſummoque jure procedunt;
" et, quia iniquum videbatur, ultra id, quam
" conventum eſt, te cogi, eliditur hæc civilis
" obligatio per exceptionem *pacti conventi*:
" et ſic, quamvis hæres meus, rigore juris
" inſpecto, poſſit abs te illos decem aureos
" annuos petere, tamen ſubmovebitur per ex-
" ceptionem *pacti conventi* de non petendo;
" quaſi videaris tacite pactum feciſſe, quod ego
" ſtipulator poſſem quidem annuos decem abs
" te petere, quamdiu viverem, hæres autem
" meus non poſſet. *Mynſ.*

De conditione.

§ IV. Sub conditione ſtipulatio fit, cum in aliquem caſum differtur obligatio, ut, ſi aliquid factum ſuerit, vel non fuerit, committatur ſtipulatio: veluti, *ſi Titius conſul fuerit factus, quinque* AUREOS *dare ſpondes?* Si quis ita ſtipuletur, *ſi in capitolium non aſcendero, dare ſpondes?* Perinde erit, ac ſi ſtipulatus eſſet, cum moreretur, ſibi dari. Ex conditionali ſtipulatione tantum ſpes eſt debitum iri; eamque ipſam ſpem in hæredem tranſmittimus, ſi prius, quam conditio extet, mors nobis contigerit.

§ 4. *A ſtipulation is conditional, when an obligation is refered to an accident, and depends upon ſome thing to be done or not done, to happen or not to happen, before the ſtipulation can take effect: for inſtance, if a man ſtipulates thus*; do you promiſe to pay me five AUREI, if TITIUS is made a conſul? *or thus*, do you promiſe to pay me five AUREI, if I do not aſcend the capitol? *which laſt ſtipulation is in effect the ſame, as if he had ſtipulated that five* AUREI *ſhould be paid to him at the time of his death. It is to be obſerved, that, in every conditional ſtipulation, there is only an hope, that the thing ſtipulated will become due; and this hope a man tranſmits to his heirs, if he dies before the event of the condition.*

De loco.

§ V. Loca etiam inſeri ſtipulationi ſolent; veluti, *Carthagini dare ſpondes?* quæ ſtipulatio, licet pure fieri videatur, tamen re ipſa habet tempus adjectum, quo promiſſor utatur ad pecuniam Carthagini dandam. Et ideo, ſi quis Romæ ita ſtipuletur, *hodie Carthagini dare ſpondes?* inutilis erit ſtipulatio, cum impoſſibilis ſit repromiſſio.

§ 5. *Even places are often inſerted in a ſtipulation; as for example*, do you promiſe to give me ſuch a particular thing at CARTHAGE? *And this ſtipulation, tho' it appears to be made ſimply, yet in reality carries with it a ſpace of time, which the obligor may make uſe of to inable himſelf to pay the money promiſed at* Carthage. *And therefore, if a man at* Rome *ſhould ſtipulate in theſe words*, do you promiſe to pay me a ſum of money this day at Carthage? *the ſtipulation would be null, becauſe the performance of it would be impoſſible.*

De

De conditione ad tempus præſens vel præteritum relata.

§ VI. Conditiones, quæ ad præſens vel præteritum tempus referuntur, aut ſtatim infirmant obligationem, aut omnino non differunt: veluti, *ſi Titius conſul fuit*, vel, *ſi Mævius vivit, dare ſpondes?* nam, ſi ea ita non ſunt, nihil valet ſtipulatio: ſin autem ita ſe habent, ſtatim valet. Quæ enim per rerum naturam ſunt certa, non morantur obligationem, licet apud nos incerta ſint.

§ 6. *Conditions, which relate to the time preſent or paſt, either inſtantly annul an obligation, or inſtantly inforce it: for example, if a man ſhould thus ſtipulate,* do you promiſe me the payment of a ſum of money, if TITIUS hath ever been a conſul? *or thus,* if MÆVIUS is now living? *If theſe things are not ſo, that is, if* Titius *hath never been a conſul, and* Mævius *is not now living, the ſtipulation is void: and if they are ſo, that is, if* Titius *hath been a conſul, and* Mævius *is actually living, then the ſtipulation is good and may be inforced: for events, which in themſelves are certain, delay not the performance of an obligation, altho' to us they are not certain.*

Quæ in ſtipulatum deducuntur.

§. VII. Non ſolum res in ſtipulatum deduci poſſunt, ſed etiam facta; ut ſi ſtipulemur aliquid fieri, vel non fieri. Et in hujuſmodi ſtipulationibus optimum erit pœnam ſubjicere, ne quantitas ſtipulationis in incerto ſit, ac neceſſe ſit actori probare, quod ejus interſit. Itaque, ſi quis, ut fiat aliquid, ſtipuletur, ita adjici pœna debet, *ſi ita factum non erit, pœnæ nomine decem aureos dare ſpondes?* Sed ſi, quædam fieri quædam non fieri, una eademque conceptione ſtipuletur quis, clauſula hujuſmodi erit adjicienda; *ſi adverſus ea factum erit, ſive quid ita factum non fuerit, tunc pœnæ nomine decem aureos dare ſpondes?*

§ 7. *Not only things, as a field, a ſlave, or a book, but alſo acts, may be the ſubject of ſtipulations; as when we ſtipulate, that ſomething ſhall or ſhall not be done. And, in theſe ſtipulations, it will be right to ſubjoin a penalty, leſt the value of the ſtipulation ſhould be incertain, and the demandant ſhould therefore be forced to prove how far he is intereſted in it. And therefore, if a man ſtipulates, that ſomething ſhall be done, a penalty ought to be thus added;* do you not promiſe to pay me ten AUREI, as a penalty, if the act ſtipulated is not performed? *But, if it is agreed in the ſame obligation, that ſome things ſhall be done, and that others ſhall not be done, then ought ſome ſuch clauſe, as the following, to be added;* do you promiſe to pay me ten AUREI, as a penalty, if any thing is done contrary to agreement; or if any thing is not done according to our agreement?

TITULUS DECIMUS-SEPTIMUS.

De duobus reis ſtipulandi et promittendi.

D. xlv. T. 2. C. viii. T. 40. Nov. 99.

Quibus modis duo rei fieri poſſunt.

ET ſtipulandi et promittendi duo pluresve rei fieri poſſunt. Stipulandi ita, ſi poſt omnium interrogationem promiſſor reſpondeat, *Spondeo*; ut puta, cum duobus ſeparatim ſtipulantibus ita promiſſor reſpondeat, *utrique veſtrum dare ſpondeo.* Nam, ſi prius Titio ſpoponderit, deinde alio interrogante ſpondeat, alia atque alia erit obligatio, nec creduntur duo rei ſtipulandi eſſe. Duo pluresve rei promittendi ita fiunt: *Mævi, decem aureos dare ſpondes? et, Sei, eoſdem decem aureos dare ſpondes?* ſi reſpondeant ſinguli ſeparatim, *Spondeo.*

Two or more perſons may ſtipulate, and two or more may become obligors. The ſtipulating parties are bound, if, after all queſtions have been aſked, the obligor anſwers, I promiſe; *as when, for example, the obligor thus anſwers two perſons ſeparately ſtipulating,* I promiſe to pay each of you. *For, if he firſt promiſes* Titius, *and afterwards promiſes another, who interrogates him, there will then be two obligations, and not two ſtipulators to one obligation. Two or more become obligors, if, after they have been thus interrogated,* MÆVIUS, do you promiſe to pay us ten AUREI? and, SEIUS, do you promiſe to pay us the ſame ten AUREI? *they each of them anſwer ſeparately,* I do promiſe.

De effectu hujusmodi ſtipulationum.

§ I. Ex hujuſmodi obligationibus et ſtipulationibus ſolidum ſingulis debetur, et promittentes ſinguli in ſolidum tenentur. In utraque tamen obligatione una res vertitur: et vel alter debitum accipiendo vel alter ſolvendo omnium perimit obligationem, et omnes liberat.

§ 1. *By theſe ſtipulations and obligations the whole ſum ſtipulated becomes due to every perſon ſtipulating, and every obligor is bound for the payment of the whole. But, as one and the ſame thing is due by each obligation, therefore any one of the ſtipulators by receiving the debt, and any one of the obligors by paying it, diſcharges the obligation of the reſt, and frees all parties.*

De ſtipulatione pura, et de die et conditione.

§ II. Ex duobus reis promittendi, alius pure, alius in diem, vel ſub conditione, obligari poteſt: nec impedimento erit dies aut conditio, quo minus ab eo, qui pure obligatus eſt, petatur.

§ 2. *Where there are two obligors, the one may bind himſelf purely and ſimply, and the other may oblige himſelf only to make payment on a day certain, or upon condition.*

condition. But neither the day certain, nor the condition, will ſecure the perſon, who is ſimply bound, from being ſued for the payment of the whole.

TITULUS DECIMUS-OCTAVUS.

De ſtipulationibus ſervorum.

D. xlv. T. 3.

An ſervus ſtipulari poſſit.

SERVUS ex perſona domini jus ſtipulandi habet: ſed et hæreditas in pleriſque perſonæ defuncti vicem ſuſtinet: ideoque, quod ſervus hæreditarius ante aditam hæreditatem ſtipulatur, acquirit hæreditati, ac per hoc etiam hæredi poſtea facto acquiritur.

A ſlave obtains the liberty of ſtipulating from the perſon of his maſter; but in many inſtances the inheritance repreſents the perſon of a maſter deceaſed: and therefore whatever an hereditary ſlave ſtipulates for, before the inheritance is entered upon, he acquires it for the inheritance, and of courſe for him, who afterwards becomes the heir.

Cui acquirat. De perſona, cui ſtipulatur. De ſtipulatione imperſonali.

§ I. Sive autem domino, ſive ſibi, ſive conſervo ſuo, ſive imperſonaliter ſervus ſtipuletur, domino acquirit. Idem juris eſt et in liberis, qui in poteſtate patris ſunt, ex quibus cauſis acquirere poſſunt.

§ 1. *A ſlave, let him ſtipulate how he will, for his maſter, for himſelf, for a fellow ſlave, or generally without naming any perſon, always acquires for his maſter. And the ſame obtains among children, who are under the power of their father, in regard to thoſe things, which they can acquire for him.*

De ſtipulatione facti.

§ II. Sed, cum factum in ſtipulatione continebitur, omnimodo perſona ſtipulantis continetur; veluti, ſi ſervus ſtipuletur, ut ſibi ire agere liceat: ipſe enim tantum prohiberi non debet, non etiam dominus ejus.

§ 2. *But, when a fact or thing to be done is contained in a ſtipulation, the perſon of the ſtipulator is ſolely regarded; ſo that, if even a ſlave ſtipulates, that he ſhall be permited to paſs thro' a field, and to drive beaſts or a carriage thro' it, it is not the maſter, but the ſlave only, who is to be permited to paſs.*

De ſervo communi.

§ III. Servus communis ſtipulando unicuique dominorum pro portione dominii acquirit: niſi juſſu unius eorum, aut nominatim alicui

eorum, ſtipulatus eſt: tunc enim ſoli ei acquiritur. Quod ſervus communis ſtipulatur, ſi alteri ex dominis acquiri non poteſt, ſolidum alteri acquiritur: veluti ſi res, quam dari ſtipulatus eſt, unius domini ſit.

§ 3. *If a ſlave, who is in common to ſeveral maſters, ſtipulates, he acquires a ſhare for each maſter according to the proportion, which each has in the property of him. But, if ſuch ſlave ſhould ſtipulate at the command of any particular maſter, or in his name, the thing ſtipulated will be acquired ſolely for that maſter. And, whatever a ſlave in common to two maſters ſtipulates for, if part cannot be acquired for one maſter, the whole ſhall be acquired for the other: as when the thing ſtipulated already belongs to one of the two.*

TITULUS DECIMUS-NONUS.

De diviſione ſtipulationum.

Diviſio.

STIPULATIONUM aliæ ſunt judiciales, aliæ prætoriæ, aliæ conventionales, aliæ communes, tam prætoriæ quam judiciales.

Some ſtipulations are judicial, *others* prætorian, *others* conventional, *and others* common; *that is, both* prætorian *and* judicial.

De judicialibus ſtipulationibus.

§ I. Judiciales ſunt duntaxat, quæ a mero judicis officio proficiſcuntur: veluti de dolo cautio, vel de perſequendo ſervo, qui in fuga eſt, reſtituendove pretio.

§ 1. *The* judicial *are thoſe, which proceed merely from the office of the judge; as when ſecurity is ordered to be given againſt fraud, or for perſuing a ſlave, who hath fled, and for paying the price of him.*

De prætoriis.

§ II. Prætoria ſunt, quæ a mero prætoris officio proficiſcuntur; veluti damni infecti vel legatorum. Prætorias autem ſtipulationes ſic audiri oportet, ut in iis etiam contineantur ædilitiæ; nam et hæ a juriſdictione prætoris veniunt.

§ 2. *The* prætorian *ſtipulations are thoſe, which proceed from the mere office of the prætor; as when ſecurity is ordered to be given,* pro damno infecto, *that is, on account of damage not yet done, but likely to happen; and for the payment of legacies. And note, that under* prætorian *ſtipulations we comprehend the* edilitian; *for theſe proceed from the juriſdiction of the prætor.*

Ut in iis contineantur Ædilitiæ.] "Ædilitiæ "ſtipulationes ſunt quibus venditor cavet de "morbis et vitiis rerum venalium; puta, *rem* "*morboſam non eſſe, ſervum fugitivum non eſſe,* et "de cæteris, quæ edicto ædilium promittuntur. *ff.* 21. *t.* 1. *De ædilitio edicto.*

"Prætoris ergo vocabulum hic in ſenſu la- "tiſſimo accipi videtur pro quovis magiſtratu, "cui eſt juriſdictio. *Hein.*

De

De conventionalibus.

§ III. Conventionales ſunt, quæ ex conventione utriuſque partis concipiuntur; hoc eſt, neque juſſu judicis, neque juſſu prætoris, ſed ex conventione contrahentium: quarum totidem ſunt genera, quot, (pene dixerim,) rerum contrahendarum.

§ 3. Conventional *ſtipulations are thoſe, which are made by the agreement of parties, that is, neither by order of a judge or prætor, but by the conſent of the perſons contracting: and of theſe ſtipulations there are as many kinds, as of things to be contracted for.*

De communibus.

§ IV. Communes ſunt, veluti rem ſalvam fore pupillo, (nam et prætor jubet rem ſalvam fore pupillo caveri, et interdum judex, ſi aliter hæc res expediri non poteſt,) vel de rato ſtipulatio.

§ 4. Common *ſtipulations are thoſe, which are ordered for the ſecurity of the effects of a pupil, (for the prætor ordains a caution to be given on this account, and ſometimes a judge commands it, when it cannot otherways be avoided,) or for the ratification of a thing done in another's name.*

Nam et prætor jubet.] " Hæc ſtipulatio, rem " ſalvam fore pupillo, regulariter juſſu prætoris " interponitur, nullo interveniente judicio aut " cauſæ cognitione; et, niſi caveat tutor, pignoribus captis et mulcta indicta coercetur; " quorum nihil eſt *judicis*, qui nudam duntaxat " cauſæ notionem habet. Sed finge, debitorem " pupilli conventum a tutore poſt litem con- " teſtatam demum, inter moras judicii, cogno- " viſſe non ſatis dediſſe tutorem, atque ad hanc " exceptionem confugere, utique audiendus erit, " et in hoc caſu officio *judicis* injungitur ſtipu- " latio. *Vinn.*

And, according to the laws of England, whoever is appointed a tutor or guardian by an ordinary, is bound to give ſecurity; and he muſt, before his admiſſion, take an oath to adminiſter all the affairs of his ward to his profit and benefit, and to give a true and faithful inventary of all his goods, and to exhibit it by a certain time aſſigned by the judge; and alſo to render an exact and true account of his office, when required. And beſides this he muſt find fit and able ſureties, who muſt be bound jointly and ſeverally for his true and faithful adminiſtration. *Cowel.* 1. *inſt. t.* 24.

But in practice, (ſays Dr. *Strahan* in his notes upon *Domat*) this law is not now obſerved, to the very great detriment of minors.

TITULUS VIGESIMUS.

De inutilibus ſtipulationibus.

C. viii. T. 39.

De his, quæ ſunt in commercio.

OMNIS res, quæ dominio noſtro ſubjicitur, in ſtipulationem deduci poteſt, ſive ea mobilis ſit, ſive ſoli.

Every thing, of which we have the property, may be brought into ſtipulation, whether it is moveable or immoveable.

De

De his, quæ non exiſtunt.

§ I. At, ſi quis rem, quæ in rerum natura non eſt, aut eſſe non poteſt, dari ſtipulatus fuerit, veluti Stichum, qui mortuus ſit, quem vivere credebat, aut Hippocentaurum, qui eſſe non poſſit, inutilis erit ſtipulatio.

§ 1. *But, if a man hath ſtipulated, that a thing ſhall be given, which does not, or can not exiſt, as for inſtance, that* Stichus, *the ſlave, who is dead, but is thought to be living, or that a centaur, who cannot exiſt, ſhould be given to him, the ſtipulation is of no force.*

De his, quæ non ſunt in commercio.

§ II. Idem juris eſt, ſi rem ſacram aut religioſam, quam humani juris eſſe credebat, vel publicam, quæ uſibus populi perpetuo expoſita ſit, ut forum, vel theatrum, vel liberum hominem, quem ſervum eſſe credebat, vel cujus commercium non habuerit, vel rem ſuam dari, quis ſtipuletur. Nec in pendenti erit ſtipulatio ob id, quod publica in privatam deduci, et ex libero ſervus fieri poteſt, et commercium adipiſci ſtipulator poteſt : ſed protinus inutilis eſt. Item contra, licet initio utiliter res in ſtipulatum deducta ſit, ſi tamen poſtea in aliquam eorum cauſam, de quibus ſupra dictum eſt, ſine facto promiſſoris devenerit, extinguitur ſtipulatio. At nec ſtatim ab initio talis ſtipulatio valebit, *Lucium Titium, cum ſervus erit, dare ſpondes?* et ſimilia. Quæ enim natura ſui dominio noſtro exempta ſunt, in obligationem deduci nullo modo poſſunt.

§ 2. *And the law is the ſame, if a thing ſacred, which was thought to be not ſo, is brought into ſtipulation; or if a man ſtipulates for a thing of conſtant public uſe, as a forum or a theatre; or for a free perſon, who was thought to be bond; or for a thing, which he cannot acquire, or for ſome thing, which is already his own: nor ſhall any ſuch ſtipulation continue in ſuſpenſe, becauſe a thing public may become private, a freeman may turn ſlave, a ſtipulator may become capable of acquiring, or becauſe what now belongs to the ſtipulator may ceaſe to be his: but every ſuch ſtipulation ſhall be inſtantly void. And, on the contrary, altho' a thing may properly be brought into ſtipulation at firſt, yet if it aftewards falls under the claſs of any of the things before mentioned without the fault of the obligor, the ſtipulation is extinguiſhed. And ſuch a ſtipulation, as the following ſhall never be valid :—for inſtance,* do you promiſe to give me LUCIUS TITIUS, when he ſhall become a ſlave? *for thoſe things, which in their natures are exempt from our dominion, are by no means to be brought into obligation.*

De facto vel donatione alterius.

§ III. Si quis alium daturum facturumve quid promiſerit, non obligabitur, veluti ſi ſpondeat Titium quinque aureos daturum. Quod ſi effecturum ſe, ut Titius daret, ſpoponderit, obligatur.

§ 3. *If a man promiſes, that another ſhall give or do ſomething, ſuch promiſſor ſhall not be bound; as if a man ſhould promiſe,* that TITIUS ſhall pay five

AUREI.

AUREI. *But, if he promiſes, that he will* cauſe TITIUS *to pay five* AUREI, *his promiſe ſhall be binding.*

De eo, in quem confertur obligatio, vel ſolutio.

§ IV. Si quis alii, quam ei, cujus juri ſubjectus eſt, ſtipuletur, nihil agit. Plane ſolutio etiam in extraneam perſonam conferri poteſt: veluti, ſi quis ita ſtipuletur, *mihi aut* SEIO *dare ſpondes?* ut obligatio quidem ſtipulatori acquiratur, ſolvi tamen Seio, etiam invito eo, recte poſſit, ut liberatio ipſo jure contingat: ſed ille adverſus Seium habeat mandati actionem. Quod ſi quis ſibi et alii, cujus juri ſubjectus non ſit, dari decem AUREOS ſtipulatus eſt, valet quidem ſtipulatio. Sed utrum totum debeatur ſtipulatori, quod in ſtipulationem deductum eſt, an vero pars dimidia, dubitatum eſt. Sed placuit, non plus, quam dimidiam partem, ei acquiri. Ei vero, qui juri tuo ſubjectus eſt, ſi ſtipulatus ſis, tibi acquiris; quia vox tua tanquam filii intelligitur in his rebus, quæ tibi acquiri poſſunt.

§ 4. *If a man ſtipulates for any other, than for him, to whom he is ſubject, ſuch ſtipulation is a void act: but nevertheleſs a payment of a thing promiſed may be made to a ſtranger; as if a man ſhould thus ſtipulate,* do you promiſe to make payment to me, or to SEIUS? *for, when the obligation is to the ſtipulator, the payment may well be made to* Seius *tho' againſt his will; and this is allowed in favor of the debtor, that he may be legally freed from his debt: and the ſtipulator, if there is occaſion, may have an action of mandate againſt* Seius. *And, if a man ſhould ſtipulate, that ten* AUREI *ſhall be paid to him, and to another, not under his power, the ſtipulation would be good: yet it hath been a doubt, whether the whole ſum due would be due to the ſtipulator, or only a moity; and it hath been reſolved, that the ſtipulator in this caſe acquires a moity only. But, if you ſtipulate for another, who is ſubject to your power, you acquire for yourſelf: for your own words are reputed your ſon's, and your ſon's words are reputed yours, in regard to all thoſe things, which you can poſſibly acquire.*

De interrogatione et reſponſione.

§ V. Præterea inutilis eſt ſtipulatio, ſi quis ad ea, quæ interrogatus fuerit, non reſpondeat, veluti ſi quis decem aureos a te dari ſibi ſtipuletur, tu quinque promittas, vel contra: aut ſi ille pure ſtipuletur, tu ſub conditione promittas, vel contra: ſi modo ſcilicet id exprimas, id eſt, ſi cui ſub conditione vel in diem ſtipulanti tu reſpondeas, *præſenti die ſpondeo.* Nam, ſi hoc ſolum reſpondeas, *Promitto,* breviter videris in eandem diem vel conditionem ſpopondiſſe. Neque enim neceſſe eſt in reſpondendo, eadem omnia repeti, quæ ſtipulator expreſſerit.

§ 5. *A ſtipulation is void, if the party interrogated does not anſwer pertinently to the demand made; as when a perſon ſtipulates, that ten* aurei *ſhall be paid him, and you anſwer five; or,* vice verſa, *if he ſtipulates for five, and you anſwer,* I promiſe ten. *Alſo if a man ſtipulates ſimply, and you promiſe conditionally; or, on the contrary, if he ſtipulates conditionally, and you anſwer purely, and in expreſs terms; that is, if, when a man is ſtipulating conditionally or at a day certain, you anſwer him*

him thus: I promiſe you payment on this preſent day. *But, if you anſwer only,* I promiſe, *you ſeem in brief ſpeech to agree to his* day *or* condition. *For it is not neceſſary, that in the anſwer every word ſhould be repeated, which the ſtipulator expreſſed.*

De his, qui ſunt, vel habent, in poteſtate.

§ VI. Item inutilis eſt ſtipulatio, ſi vel ab eo ſtipuleris, qui tuo juri ſubjectus eſt, vel ſi is a te ſtipuletur. Sed ſervus quidem non ſolum domino ſuo obligari non poteſt, ſed ne quidem ulli alii: filii vero familiarum aliis obligari poſſunt.

§ 6. *A ſtipulation is alſo void, if you ſtipulate with him, who is in ſubjection to your power, or if he ſtipulates with you. For a ſlave is not only incapable of entering into an obligation with his maſter, but is alſo incapable of binding himſelf to any other perſon. But the ſon of a family can enter into an obligation with any other perſon, except his father.*

Filii vero familiarum.] " Inter ſervum et fi- " lium familias hoc intereſt, quod ſervus non " tantum domino, ſed nec ulli alii ex con- " tractu civiliter obligari poteſt; quia, quod ad " jus civile attinet, ſervi pro nullis habentur; " filii autem familias, extra patrem et cauſam " mutui, ut reliqui cives, obligantur. *Vinn.*

De muto et ſurdo.

§ VII. Mutum neque ſtipulari neque promittere poſſe, palam eſt; quod et in ſurdo receptum eſt: quia et is, qui ſtipulatur, verba promittentis, et is, qui promittit, verba ſtipulantis, audire debet. Unde apparet, non de eo nos loqui, qui tardius exaudit, ſed de eo, qui omnino non audit.

§ 7. *It is evident, that a dumb man can neither ſtipulate, nor promiſe: and the ſame law is received in regard to deaf perſons; for he, who ſtipulates, ought to hear the words of the obligor; and he, who promiſes, the words of the ſtipulator. But we ſpeak not of him, who hears with difficulty, but of him, who has no hearing.*

De furioſo.

§ VIII. Furioſus nullum negotium gerere poteſt, quia non intelligit, quod agit.

§ 8. *A madman can tranſact no buſineſs, becauſe he underſtands not what he does.*

De impubere.

§ IX. Pupillus omne negotium recte gerit, ita tamen ut, ubi tutoris auctoritas neceſſaria ſit, adhibeatur tutor: veluti, ſi ipſe obligetur: nam alium ſibi obligare etiam ſine tutoris auctoritate poteſt. Sed quod diximus de pupillis, utique de iis verum eſt, qui jam habent aliquem intellectum. Nam infans, et qui infantiæ proximus eſt, non multum a furioſo diſtant: quia hujuſmodi ætatis pupilli nullum habent intellectum.

lectum. Sed in proximis infantiæ propter utilitatem eorum benignior juris interpretatio facta est, ut idem juris habeant, quod pubertati proximi. Sed, qui in potestate parentis est impubes, ne auctore quidem patre obligatur.

§ 9. *A pupil is capable of transacting any business, if his tutor consents, where his authority is necessary; as it certainly is, when the pupil would bind himself: but a pupil can stipulate or cause others to be bound to him, without the authority of his tutor. What we have said of pupils must be understood of those, who have some understanding; for an infant, or one next to an infant, differs but little from a person out of his senses: for pupils of such an age have no understanding: but a more favorable interpretation is given to the law in regard to those, who are but little removed from infancy, whenever their own utility is concerned; so that they are then allowed the same rights, as those, who are near the age of puberty. But a son, who is under the power of his father, and within the age of puberty, cannot bind himself, even altho his father consents, and authorises the transaction.*

Ne auctore quidem patre..] " Pupillus non " tutori sed sibi acquirit, placetque, eum etiam " sine tutoris auctoritate contrahendo alios sibi " obligare; quo fit, ut ad utilitatem pupilli " pertineat, ut et ipse invicem saltem, tutore " auctore, obligari possit; cum alioqui nemo " facile cum eo contracturus sit; at, qui in po- " testate patris est, non sibi, sed patri acquirit; " non ad suam, sed ad patris, utilitatem con- " trahit; ut proinde nunquam e re impuberis, " in potestate constituti, esse possit, invicem " obligari. *Vinn.* h. l.

De conditione impossibili.

§ X. Si impossibilis conditio stipulationibus adjiciatur, nihil valet stipulatio. Impossibilis autem conditio habetur, cui natura impedimento est, quominus existat; veluti si quis ita dixerit; *si digito cælum attigero, dare spondes?* at, si ita stipuletur, *si digito cælum non attigero, dare spondes?* pure facta obligatio intelligitur, ideoque statim peti potest.

§ 10. *If an impossible condition is added to an obligation, the stipulation is null; and that condition is reckoned impossible, of which nature forbids the event: as, for example, if a man should say,* do you promise me ten AUREI, if I touch the heavens with my finger? *but suppose a stipulation to be thus made;* do you promise me payment, if I do not touch the sky with my finger? *such a stipulation would be understood to cause a simple obligation, the performance of which might be instantly demanded.*

Si impossibilis conditio.] In *England*, if the condition of a bond is impossible at the time of making, as for instance, if it be, *that the obligor shall arrive at Rome the next day*, such a bond is not regarded as null, but as single, and the same, as if no condition was annexed to it. But, if the condition of a bond is possible at the time of making, and, before such condition can be performed, it becomes impossible by the act of God, by the act of the law, or by the act of the obligee, the obligation in such case is saved. *Co. Lit.* 206. *a.*

De absentia.

§ XI. Item verborum obligatio, inter absentes concepta, inutilis est. Sed, cum hoc materiam litium contentiosis hominibus præstabat, forte post tempus tales allegationes opponentibus, et non præsentes fuisse vel se vel adversarios suos contendentibus, ideo nostra constitutio propter celeritatem dirimendarum litium introducta est, quam ad Cæsarienses advocatos

ſcripſimus ; per quam diſpoſuimus, tales ſcripturas, quæ præſto eſſe partes indicant, omnino eſſe credendas, niſi is, qui talibus utitur improbis allegationibus, manifeſtiſſimis probationibus, vel per ſcripturam, vel per teſtes idoneos, approbaverit, toto eo die, quo conficiebatur inſtrumentum, ſeſe vel adverſarium ſuum in aliis locis fuiſſe.

§ 11. *A verbal obligation, made between abſent perſons, is alſo void. But, when this doctrine afforded matter of ſtrife to contentious men, alleging after ſome time paſt, that either they or their adverſaries were not preſent, we iſſued our conſtitution, addreſſed as a reſcript to the advocates of* Cæſarea, *which effectually provided for the ſpeedy determination of ſuch ſuits : and by this we have ordained, that full credit ſhall be given to thoſe written acts, or inſtruments, which declare, that the contracting parties were preſent, unleſs the party, who alleges abſence, makes it evident by the moſt manifeſt proofs either in writing or by witneſſes, that either he, or his adverſary, was in ſome other place, during the whole day, in which the inſtrument was ſaid to be made.*

Ideo noſtra conſtitutione.] *vid. Cod.* 8. *de contrabenda ſtipulatione. t.* 38. *l.* 14.

De ſtipulatione poſt mortem, vel pridie quam alter contrahentium moriatur.

§ XII. Poſt mortem ſuam dari ſibi nemo ſtipulari poterat, non magis quam poſt mortem ejus, a quo ſtipulabatur. Ac nec is, qui in alicujus poteſtate eſt, poſt mortem ejus ſtipulari poterat ; quia patris vel domini voce loqui videretur. Sed et, ſi quis ita ſtipuletur, *pridie quam moriar*, vel, *pridie quam morieris, dare ſpondes?* inutilis erat ſtipulatio. Sed, cum, ut jam dictum eſt, ex conſenſu contrahentium ſtipulationes valeant, placuit nobis,etiam in hunc juris articulum neceſſariam inducere emendationem, ut, ſive poſt mortem, ſive pridie quam moriatur ſtipulator, ſive promiſſor, ſtipulatio concepta ſit, ſtipulatio valeat.

§ 12. *A man could formerly no more ſtipulate, that a thing ſhould be given him after his own death, than he could ſtipulate, that a thing ſhould be given him, after the death of the obligor. Neither could any perſon under the power of another ſtipulate, that any thing ſhould be given him after his death, becauſe ſuch perſon would appear to ſpeak the words of his father or maſter. And, if a man had ſtipulated in this manner,* do you promiſe to give me five AUREI the day before I die? *or* the day before you die? *the ſtipulation was alſo invalid. But, ſince all ſtipulations, as we have already ſaid, take their riſe and force from the conſent of the contracting parties, we have thought it proper to introduce a neceſſary emendation in this reſpect, ſo that, whether it is ſtipulated, that a thing ſhall be given after, or immediately before, the death either of the ſtipulator, or the obligor, the ſtipulation ſhall be good.*

Inducere emendationem.] " Juſtinianus ſcrupuloſam hanc veteris juris ſubtilitatem ſuſtulit conſtitutionibus ſuis, quæ extant, in *Cod.* 8. *t.* 38. *l.* 11. *et Cod.* 4. *t.* 11. *l. un.*

" In qua juris mutatione ait, ſe reſpexiſſe non ad conceptionem verborum, ſed ad ſententiam et mentem contrahentium, quaſi qui ſtipulatur, *poſt mortem ſuam ſibi dari*, non debeat exiſtimari tam ſtultus, ut ſibi ipſi in id tempus ſtipuletur ; ſed hoc perinde ſic accipiendum, ac ſi poſt mortem ſuam ſtipulatus eſſet hæredi ſuo, in cujus perſona quodammodo adhuc vivere videatur. *Vinn.*

De ſtipulatione præpoſtera.

§ XIII. Item, ſi quis ita ſtipulatus erat, *ſi navis cras ex Aſia venerit, hodie dare ſpondes?* inutilis erat ſtipulatio, quia præpoſtere concepta eſt. Sed, cum Leo inclytæ recordationis in dotibus eandem ſtipulationem, quæ præpoſtera nuncupatur, non eſſe rejiciendam exiſtimaverit, nobis placuit et huic perfectum robur accommodare, ut non ſolum in dotibus, ſed etiam in omnibus, valeat hujuſmodi conceptio ſtipulationis.

§ 13. *Alſo, if a man had ſtipulated in theſe words*, do you promiſe me a ſum of money to-day, if a certain ſhip arrives to-morrow from ASIA? *the ſtipulation would have been invalid, becauſe prepoſterouſly conceived. But, ſince the emperor* Leo, *of renowned memory, was of opinion, that ſuch ſtipulations ought not to be rejected in regard to marriage portions, it hath pleaſed* us *alſo to give a fuller force to this doctrine by ordaining, that every ſtipulation of like import ſhall hold good not only in marriage portions, but likewiſe in all other contracts.*

Nobis placuit.] *vid. Cod.* 6. *t.* 23. *l.* 25. *præpoſteri reprehenſionem*, &c.

De ſtipulatione collata in tempus mortis.

§ XIV. Ita autem ſtipulatio concepta, veluti ſi Titius dicat, *cum moriar, dare ſpondes?* vel *cum morieris?* et apud veteres utilis erat, et nunc valet.

§ 14. *If a ſtipulation had been conceived in the following words*; do you promiſe to give me ten AUREI, at the time, when I ſhall die? *or thus*, at the time, when you ſhall die? *it was good by the antient law, and is now valid.*

§ XV. Item poſt mortem alterius recte ſtipulamur.

§ 15. *We may alſo legally ſtipulate, that a thing ſhall be given, after the death of a third perſon.*

De promiſſione ſcripta in inſtrumento.

§ XVI. Si ſcriptum in inſtrumento fuerit, promiſiſſe aliquem, perinde habetur, atque ſi interrogatione præcedente reſponſum ſit.

§ 16. *If it is written in an act or inſtrument, properly atteſted, that a man hath entered into an obligation by promiſe, it will be always preſumed, that the promiſe was in anſwer to a precedent interrogation, and that every thing was done regularly.*

De pluribus rebus.

§ XVII. Quoties plures res una ſtipulatione comprehenduntur, ſiquidem promiſſor ſimpliciter reſpondeat, *dare ſpondeo*, propter omnes tenetur. Si vero unam ex his, vel quaſdam, daturum ſe ſpoponderit, obligatio in iis, pro quibus ſpoponderit, contrahitur. Ex pluribus enim ſtipulationibus una vel quædam videntur eſſe perfectæ; ſingulas enim res ſtipulari, et ad ſingulas reſpondere, debemus.

§ 17. *When many things are comprehended in one ſtipulation, a man binds himſelf to give them all, if he anſwers ſimply* I promiſe. *But, if he promiſes to give one or ſome of the things ſtipulated, an obligation is contracted only in reſpect to thoſe things, which he promiſed to give. For, where there are many ſtipulations, it may happen, that only one, or ſome of them may be made perfect by a ſeparate anſwer; and ſtrictly we ought to ſtipulate for every thing ſeverally, and to anſwer ſeverally.*

De pœna adjecta ſtipulationi, alii dari.

§ XVIII. Alteri ſtipulari (ut ſupra dictum eſt) nemo poteſt. Inventæ enim ſunt hujuſmodi ſtipulationes vel obligationes ad hoc, ut unuſquiſque acquirat ſibi, quod ſua intereſt: cæterum, ſi alii detur, nihil intereſt ſtipulatoris. Plane, ſi quis velit hoc facere, pœnam ſtipulari conveniet, ut, niſi ita factum ſit, ut eſt comprehenſum, committatur pœnæ ſtipulatio etiam ei, cujus nihil intereſt. Pœnam enim cum ſtipulatur quis, non illud inſpicitur, quod interſit ejus, ſed quæ ſit quantitas in conditione ſtipulationis. Ergo, ſi quis ita ſtipuletur, *Titio dari*, nihil agit. Sed, ſi adjecerit pœnam, *niſi dederis, tot aureos dare ſpondes?* tunc committitur ſtipulatio.

§ 18. *No man can ſtipulate for another, as we have already obſerved; for ſtipulations and obligations have been invented, that every perſon may acquire for himſelf whatever may be of advantage to him; and, if this is given to another, the ſtipulator has no intereſt. But, if a man would effectually contract for another, he ſhould ſtipulate, that unleſs the covenants of his ſtipulation are performed, the obligor ſhall be ſubject to a penalty, payable to him, who otherwiſe would receive no advantage from the obligation: for, when a penalty is ſtipulated, the advantage or intereſt of the ſtipulator is not regarded, but the quantity of the penalty is the only thing conſidered. And therefore, if a man ſhould ſtipulate,* that a certain thing ſhall be given to TITIUS, *it will not avail; but, if to the ſtipulation he adds a penalty as thus,* do you promiſe to give me ten AUREI, if you do not give the thing ſtipulated to TITIUS? *the ſtipulation of the penalty will take place, if the obligation is not performed.*

Si interſit ejus, qui alii ſtipulatur.

§ XIX. Sed et, ſi quis ſtipuletur alii, cum ejus intereſſet, placuit ſtipulationem valere. Nam, ſi is, qui pupilli tutelam adminiſtrare cœperat, ceſſerit adminiſtrationem contutori ſuo, et ſtipuletur rem pupilli ſalvam fore, quoniam intereſt ſtipulatoris fieri, quod ſtipulatus eſt, cum obligatus futurus ſit pupillo, ſi male res geſſerit, tenet obligatio. Ergo, et ſi quis procuratori ſuo dari ſtipulatus ſit, habebit vires ſtipulatio. Et, ſi creditori ſuo quis ſtipulatus ſit quod ſua intereſt, ne forte vel pœna committatur, vel prædia diſtrahantur, quæ pignori data erant, valet ſtipulatio.

§ 19. *But, if any man ſtipulates for the benefit of another, when he himſelf alſo receives an advantage from it, the ſtipulation is valid. Thus if he, who hath begun to adminiſter the tutelage of a pupil, ſhould afterwards cede or give up the adminiſtration to his co-tutor, and ſtipulate for the ſecurity of the eſtate of his pupil, in this*

this caſe, (inaſmuch as ſuch a ſtipulation is for the intereſt of the ſtipulator, who would be obliged to anſwer all damages to the pupil, if the co-tutor did not juſtly adminiſter the pupillary truſt,) the obligation would bind. And upon the ſame principle, if a man ſtipulates, that a thing ſhall be given to his proctor or attorney, the ſtipulation ſhall prevail. And a ſtipulation is alſo good, which is made by a debtor for the uſe of his creditor, becauſe it is the intereſt of the debtor, either that the penalty, upon which he borrowed money of his creditor, ſhould not be exacted from him, or that his goods, which are hypothecated with his creditor, ſhould not be ſold.

De pœna adjecta promiſſioni facti alieni.

§ XX. Vice verſa, qui alium facturum promiſit, videtur in ea eſſe cauſa, ut non teneatur, niſi pœnam ipſe promiſerit.

§ 20. *On the contrary, he, who promiſes, that another, namely* TITIUS, *ſhall perform ſome particular act, is not bound by ſuch promiſe, unleſs he makes himſelf ſubject to a penalty, if the act is not performed by* TITIUS.

De re ſtipulantis futura.

§ XXI. Item nemo rem ſuam futuram, in eum caſum, quo ſua ſit, utiliter ſtipulatur.

§ 21. *No man can legally ſtipulate, that a thing ſhall be given him, when it ſhall become his own.*

Item nemo] The deciſion in this paragraph is founded upon the following rule of law: *quæ ad eum caſum perveniunt, a quo non potuiſſent incipere, nullatenus valent.* Ferriere.

De diſſenſu.

§ XXII. Si de alia re ſtipulator ſenſerit, de alia promiſſor, perinde nulla contrahitur obligatio, ac ſi ad interrogatum reſponſum non eſſet: veluti ſi hominem Stichum a te quis ſtipulatus fuerit, tu de Pamphilo ſenſeris, quem Stichum vocari credideris.

§ 22. *If the ſtipulator ſtipulates in regard to one thing, and the obligor promiſes in relation to another, no obligation is contracted; and the parties are as much at liberty, as if no anſwer had been made to the interrogation: and this would be the caſe, if a man ſhould ſtipulate, that* Stichus *ſhould be given to him, and the obligor ſhould intend to give* Pamphilus, *upon a thorough perſwaſion, that* Pamphilus *is called* Stichus.

De turpi cauſa.

§ XXIII. Quod turpi ex cauſa promiſſum eſt, veluti ſi quis homicidium vel ſacrilegium ſe facturum promittat, non valet.

§ 23. *A promiſe made for a diſhoneſt purpoſe, as, for example, to commit homicide or ſacrilege, is not binding.*

De morte contrahentium.

§ XXIV. Cum quis ſub aliqua conditione ſtipulatus fuerit, licet ante conditionem deceſſerit, poſtea exiſtente conditione hæres ejus agere poteſt. Idem eſt et ex promiſſoris parte.

§ 24.

§ 24. *If a ſtipulation hath been entered into upon condition, and the ſtipulator ſhould die pending the event of it, his heir will be intituled to an action againſt the obligor, if the event afterwards happens. And, if the obligor ſhould die before the condition happens, his heir may be ſued by the* ſtipulator.

Quando agi poteſt ex ſtipulatione.

§ XXV. Qui hoc anno aut hoc menſe dari ſtipulatus eſt, niſi omnibus partibus anni vel menſis præteritis, non recte petet. Si fundum dari ſtipuleris, vel hominem, non poteris continuo agere, niſi tantum ſpatium præterierit, quo traditio fieri poſſit.

§ 25. *Whoever ſtipulates, that a thing ſhall be given to him this year or this month, cannot legally ſue the obligor, till the whole year or month is elapſed. And, if a man ſtipulates, that a piece of ground, or ſlave, ſhall be given to him, he cannot inſtantly ſue the obligor, but muſt wait, till ſuch a ſpace of time hath paſt, in which a delivery might reaſonably have been made.*

TITULUS VIGESIMUS-PRIMUS.

De fidejuſſoribus.

D. xlvi. T. 1. C. viii. T. 41. Nov. 4.

Cur accipiuntur fidejuſſores.

PRO eo, qui promittit, ſolent alii obligari, qui fidejuſſores appellantur: quos homines accipere ſolent, dum curant, ut diligentius ſibi cautum ſit.

It frequently happens, that others bind themſelves for him, who promiſes. Theſe bondſmen or ſureties are called fide-juſſors, *and are generally required by creditors for their greater ſecurity.*

In quibus obligationibus.

§ I. In omnibus autem obligationibus adſumi poſſunt, id eſt, ſive re, ſive verbis, ſive literis, ſive conſenſu, contractæ fuerint. Ac nec illud quidem intereſt, utrum civilis, an naturalis ſit obligatio, cui adjicitur fidejuſſor: adeo quidem, ut pro ſervo quoque obligetur, ſive extraneus ſit, qui fidejuſſorem a ſervo accipiat, ſive ipſe dominus, in id, quod ſibi naturaliter debetur.

§ 1. Fide-juſſors *may be received in all obligations, whether contracted by the delivery of the thing itſelf, by words, by writing, or the mere conſent of parties: nor is it material, whether the obligation is civil or natural, for a man may intervene, and oblige himſelf, as a* fide-juſſor *or ſurety, even on the behalf of a ſlave; and this may be done, whether the perſon, who accepts the* fide-juſſor, *is a ſtranger*

ſtranger or the maſter of the ſlave, when the thing due is a natural debt or obligation.

De hærede.

§ II. Fidejuſſor non tantum ipſe obligatur, ſed etiam hæredem relinquit obligatum.

§ 2. *A* fide-juſſor *is not only bound himſelf, but by his death tranſmits the obligation to his heir.*

Si fidejuſſor præcedat vel ſequatur obligationem.

§ III. Fidejuſſor et præcedere obligationem et ſequi poteſt.

§ 3. *A* fide-juſſor *may be accepted either before or after an obligation is entered into.*

De pluribus fidejuſſoribus.

§ IV. Si plures ſint fidejuſſores, quotquot erunt numero, ſinguli in ſolidum tenentur. Itaque liberum eſt creditori, a quo velit, ſolidum petere. Sed ex epiſtola Divi Hadriani compellitur creditor a ſingulis, qui modo ſolvendo ſunt litis conteſtatæ tempore, partes petere. Ideoque, ſi quis ex fidejuſſoribus eo tempore ſolvendo non ſit, hoc cæteros onerat. Sed, ſi ab uno fidejuſſore creditor totum conſecutus fuerit, hujus ſolius detrimentum erit, ſi is, pro quo fidejuſſit, ſolvendo non ſit: et ſibi imputare debet, cum potuerit juvari ex epiſtola Divi Hadriani, et deſiderare, ut pro parte in ſe detur actio.

§ 4. *Where there are* fide-juſſors *or ſureties, let them be ever ſo numerous, they are each bound by law* in ſolidum, *i. e. for the whole debt; and the creditor is at liberty to chuſe from whom he will demand it. But, by a reſcript of the emperor* Adrian, *a creditor may be obliged to demand ſeparately from every* fide-juſſor, *who is ſolvent at the Time of conteſtation of ſuit, his ſhare of the debt* pro rata; *and, if any of the* fide-juſſors, *at the time of the conteſtation of the ſuit, is not ſolvent, the burden falls upon the reſt. But, if a creditor obtains his whole demand from one of the* fide-juſſors, *the whole loſs ſhall be his, if the party principal, for whom he was bound, is inſolvent: for ſuch* fide-juſſor *can impute this loſs only to himſelf, ſince he might have called to his aid the reſcript of the emperor* Adrian, *and have prayed, that an action ſhould not have been given againſt him, obliging him to the payment of more than his ſhare of the debt, as a ſurety.*

Si plures ſint fidejuſſores.] In *England*, when two or more are bound, without ſpecifying whether they are bound jointly, or jointly and ſeverally, nothing is more certain, than that each may be ſued by the obligee for his whole debt: but the party, who was ſued, may have his remedy over againſt the obligor or his fellow ſurety. But, when perſons are bound jointly, they muſt be ſued jointly; and, when they are bound jointly and ſeverally, the obligee may ſue them jointly or ſeverally at his election. See *Bacon*'s abridgement, *verb.* obligations. D.

In quam ſummam obligatur fide-juſſor.

§ V. Fidejuſſores ita obligari non poſſunt, ut plus debeant, quam debet is, pro quo obligantur. Nam eorum obligatio acceſſio eſt principalis

palis obligationis: nec plus in acceſſione poteſt eſſe, quam in principali re: at ex diverſo, ut minus debeant, obligari poſſunt. Itaque, ſi reus decem aureos promiſerit, fidejuſſor in quinque recte obligatur: contra vero obligari non poteſt. Item, ſi ille pure promiſerit, fidejuſſor ſub conditione promittere poteſt; contra vero non poteſt. Non ſolum autem in quantitate, ſed etiam in tempore, minus aut plus intelligitur. Plus enim eſt ſtatim aliquid dare, minus eſt poſt tempus dare.

§ 5. Fide-juſſors *ought not to be bound in a greater ſum, than the debtor owes, for whom they are bound; for their obligation is an acceſſion to the principal obligation; and an acceſſary debt cannot be greater, than the principal, tho' it may be leſs. Therefore, if the principal obligor promiſes ten* aurei, *the* fide-juſſor *may be bound in five; but the* fide-juſſor *cannot be bound in* ten aurei, *when the principal obligor is bound only in five. Alſo, when the obligor promiſes ſimply, the ſurety may promiſe conditionally: but, if the ſurety is bound ſimply, when the principal debtor is bound only conditionally, the obligation is void. And the terms* greater *and* leſs *take place not only in quantity but alſo in time; for an obligation to give or deliver a thing inſtantly is greater, than an obligation to give or deliver it after a time.*

De actione fidejuſſoris.

§ VI. Si quid autem fidejuſſor pro reo ſolverit, ejus recuperandi cauſa habet cum eo mandati judicium.

§ 6. *If a* fide-juſſor *hath been obliged to pay money for the perſon, for whom he was bound, the* fide-juſſor *may have an action of mandate againſt him for the recovery of the ſum paid.*

Si fidejuſſor græce accipiatur.

§ VII. Græce etiam fidejuſſor ita accipitur, τη ἐμη πιϛει κελευω ἐγω. Sed et ſi dixerit, θελω, ſive βυλομαι, ſed et, φημι, pro eo erit, ac ſi dixerit, λεγω.

§ 7. *A* fide-juſſor *may thus bind himſelf even in greek;* τη ἐμη πιϛει κελευω, λεγω. *that is,* I anſwer or ſpeak ſolemnly upon my faith. *But, if a man ſhould uſe the words* θελω *or* βυλομαι, *I am willing, or* φημι, *I promiſe, any of theſe would ſerve the ſame purpoſe, as* κελευω *or* λεγω.

Si ſcriptum ſit, aliquem fidejuſſiſſe.

§ VIII. In ſtipulationibus fidejuſſorum ſciendum eſt, hoc generaliter accipi, ut, quodcumque ſcriptum ſit quaſi actum, videatur etiam actum. Ideoque conſtat, ſi quis ſcripſerit ſe fidejuſſiſſe, videri omnia ſolemniter acta.

§ 8. *We muſt here obſerve, that it is a general rule in all fide-juſſorial ſtipulations, that whatever is alleged in writing to have been done, is to be preſumed to have been actually done: and therefore, if a man in writing confeſſes, that he hath made himſelf a* fide-juſſor, *it is alſo preſumed, that all the neceſſary forms were obſerved.*

TITU-

TITULUS VIGESIMUS-SECUNDUS.

De literarum obligationibus.

Cod. iv. T. 30.

OLIM ſcriptura fiebat obligatio, quæ nominibus fieri dicebatur: quæ nomina hodie non ſunt in uſu. Plane, ſi quis debere ſe ſcripſerit, quod ſibi numeratum non eſt, de pecunia minime numerata, poſt multum temporis, exceptionem opponere non poteſt. Hoc enim ſæpiſſime conſtitutum eſt. Sic fit, ut et hodie, dum queri non poteſt, ſcriptura obligetur, et ex ea naſcatur condictio, ceſſante ſcilicet verborum obligatione. Multum autem tempus in hac exceptione antea quidem ex principalibus conſtitutionibus uſque ad quinquennium procedebat: ſed, ne creditores diutius poſſint ſuis pecuniis forſitan defraudari, per conſtitutionem noſtram tempus coarctatum eſt, ut ultra biennii metas hujuſmodi exceptio minime extendatur.

A ſpecies of writen obligation antiently prevailed, which was effected by regiſtering the names of the contractors; but theſe contracts, which were called nomina, *are not now in uſe. But, if a man confeſſes in writing, that he owes, what in reality he never received, he cannot, when an action is brought againſt him for this confeſſed debt, oppoſe an exception to it, ſetting forth,* that the money was never paid; *if much time has elapſed after the date of the obligation: and the limitation of this time has frequently been preſcribed by the conſtitutions. Hence it is, at this day, that a man muſt be bound by his writen note, if he cannot legally bring an exception; and from this writen contract ariſes an action called a* condiction, *when no ſtipulation or verbal obligation can be proved. And formerly the imperial conſtitutions gave a large ſpace of time, not leſs than five years, in which any man was allowed to bring an exception,* pecuniæ non numeratæ, *i. e. an exception of money not paid. But we, for the ſafety of creditors in general, have greatly contracted this allowance of time, by our imperial conſtitution, which ordains, that an exception ſhall not be brought after the expiration of two years.*

Ex principalibus conſtitutionibus.] "Qui de- "ſiderat cognoſcere tempora, olim omnibus "cautionibus præſtituta, legat conſtitutionem "Imppp Honorii, Theodoſii, et Conſtantii, "quam reperiet libro 2do. Cod. Theod. tit. "*ſi certum. Mynſ.*

Per noſtram conſtitutionem.] *vid. Cod.* 4. *t.* 30. *l.* 14.

TITULUS VIGESIMUS-TERTIUS.

De obligationibus ex conſenſu.

Continuatio.

CONSENSU fiunt obligationes in emptionibus, venditionibus, locationibus, conductionibus, ſocietatibus, mandatis: ideo autem iſtis modis obligatio dicitur conſenſu contrahi, quia neque ſcriptura, neque præſentia, omnimodo opus eſt: ac nec dari quicquam neceſſe eſt, ut ſubſtantiam capiat obligatio, ſed ſufficit, eos, qui negotia gerunt, conſentire: unde inter abſentes quoque talia negotia contrahuntur, veluti per epiſtolam vel per nuntium. Item in his contractibus alter alteri obligatur in id, quod alterum alteri ex bono et æquo præſtare oportet, cum alioqui in verborum obligationibus alius ſtipuletur, alius promittat.

Obligations are made by conſent in buying, ſelling, letting, hireing, ſocieties *or* partenerſhips, *and* mandates. *And an obligation, entered into by any of thoſe means, is ſaid to be contracted by conſent; becauſe neither writing nor the preſence of parties is abſolutely requiſite. Neither is it neceſſary, that any thing ſhould be given or delivered, to the intent, that the obligation ſhould take effect; for it ſuffices, that the contractors conſent; and, for this reaſon, theſe contracts may be entered into by abſent parties, either by letters or meſſengers. And note alſo, that, in theſe contracts by conſent, the parties are bound to each other mutually to do what is juſt and right; but in verbal obligations one party ſtipulates and the other promiſes.*

TITULUS VIGESIMUS-QUARTUS.

De emptione et venditione.

D. xviii. & xix. T. 1. C. iv. T. 38. & 40.

De emptione pura. De pretii conventione, arrhis, et ſcriptura.

EMPTIO et venditio contrahitur, ſimul atque de pretio convenerit, quamvis nondum pretium numeratum ſit, ac ne arrha quidem data ſuerit: nam, quod arrhæ nomine datur, argumentum eſt emptionis et venditionis contractæ. Sed hoc quidem de emptionibus et venditionibus, quæ ſine ſcriptura conſiſtunt, obtinere oportet: nam nihil a nobis in hujuſmodi emptionibus et venditionibus innovatum eſt. In iis autem, quæ ſcriptura conficiuntur, non aliter perfectam eſſe venditionem et emptionem

nem conſtituimus, niſi et inſtrumenta emptionis fuerint conſcripta, vel manu propria contrahentium, vel ab alio quidem ſcripta, a contrahentibus autem ſubſcripta: et ſi per tabellionem fiunt, niſi et completiones acceperint, et fuerint partibus abſoluta. Donec enim aliquid deeſt ex his, et pœnitentiæ locus eſt, et poteſt emptor vel venditor ſine pœna recedere ab emptione et venditione. Ita tamen impune recedere concedimus, niſi jam arrharum nomine aliquid fuerit datum: hoc enim ſubſecuto, ſive in ſcriptis, ſive ſine ſcriptis, venditio celebrata eſt, is, qui recuſat adimplere contractum, ſi quidem eſt emptor, perdit quod dedit; ſi vero venditor, duplum reſtituere compellitur; licet ſuper arrhis nihil expreſſum ſit. Pretium autem conſtitui oportet; nam nulla emptio ſine pretio eſſe poteſt.

The contract of buying and ſelling is made perfect; as ſoon as the price of the thing to be ſold is agreed upon, altho' it is not paid; nor even an earneſt of it given; for whatever is taken, as earneſt, does not conſtitute a contract, but ſerves only for a proof of it. And this is the law in regard to thoſe bargains and ſales, which are not in writing; for in ſuch we have made no innovation. But, where there is a writen contract, we have ordained, that a bargain and ſale ſhall not become abſolute, unleſs the inſtruments of ſale are writen by the contracting parties or at leaſt ſigned by them, if writen by others. And, when the inſtruments of ſale are drawn by a public notary, the contract is not binding, if any formality hath been omitted, or if the inſtruments are not complete in all their parts: for, if any thing is omitted, either the buyer or ſeller may recede from his agreement without penalty, if nothing has been given in the name of earneſt. But, if earneſt has once been given, then the buyer, whether the contract was writen or unwriten, if he refuſes to fullfill it, loſes his earneſt, and the ſeller, if he refuſes, is compellable to reſtore double the value of the earneſt, altho' no agreement of this kind was expreſly made. But it is always neceſſary, that the price of the thing to be ſold ſhould be fixed; for, till then, there can be no emptio-venditio, *i. e. buying and ſelling.*

In iis autem.] *vid. Cod.* 4. *t.* 21. *De fide inſtrumentorum.*

By the civil law all covenants of ſale were good, whether writen or unwriten, to whatever value they extended But in *England*, it hath been enacted by 29. *Car. cap.* 3. *ſect.* 17. "That "no contract for the ſale of any goods, wares, "and merchandizes for the price of ten pounds "ſterling or upwards, ſhall be allowed to be "good, except the buyer ſhall accept part of "the goods ſo ſold, and actually receive the "ſame, or give ſomething in earneſt to bind "the bargain, or in part of payment, or unleſs "ſome note, or memorandum, in writing of "the ſaid bargain be made and ſigned by the "parties to be charged by ſuch a contract, or "their agents thereunto lawfully authorized." 29 *Car.* 2.

De pretio certo, vel incerto, vel in arbitrium alienum collato.

§ I. Sed et certum eſſe pretium debet: alioqui, ſi inter aliquos ita convenerit, ut, quanti Titius rem æſtimaverit, tanti ſit empta, inter veteres ſatis abundeque hoc dubitabatur, conſtaretne venditio, an non. Sed noſtra deciſio ita hoc conſtituit, ut, quoties ſic compoſita ſit venditio, *quanti ille æſtimaverit*, ſub hac conditione ſtaret contractus, ut ſiquidem ille, qui nominatus eſt, pretium definierit, tunc omnimodo ſecundum ejus æſtimationem et pretium perſolvatur, et res tradatur, et venditio ad

effectum perducatur; emptore quidem ex empto actione, venditore ex vendito agente. Sin autem ille, qui nominatus est, vel noluerit, vel non potuerit, pretium definire, tunc pro nihilo esse venditionem, quasi nullo pretio statuto. Quod jus, cum in venditionibus nobis placuerit, non est absurdum et in locationibus et in conductionibus tradere.

§ 1. *The price, as we have before observed, ought to be certain. And formerly, when it was covenanted, that a thing should be sold,* at whatever price TITIUS should value it, *the antient lawyers much doubted, whether such a sale was good, or not good. But we have ordained by our decision, that as often as it is agreed, that a thing shall be sold,* at a price to be fixed by a third person, *such contract shall be valid under that condition; so that, if the nominee, or arbitrator, determines the price, it ought instantly to be paid according to the determination, and the thing sold ought to be delivered, and the sale perfected; for otherwise the buyer may have an action* ex empto, *i. e. on account of the thing bought; and the seller may have an action* ex vendito, *i. e. on account of the thing sold. But, if the arbitrator either refuses, or is unable to determine the price, the sale is null. And, as it has been our pleasure, that this shall be the law in relation to sales, it is but right, that the same law should prevail, in* locations *and* conductions, *i. e. in letting and hireing.*

Sed nostra decisio.] *Cod.* 4. *t.* 38. *l.* 15.

In quibus pretium consistat. Differentia emptionis et permutationis.

§ II. Item pretium in numerata pecunia consistere debet. Nam in cæteris rebus, an pretium esse posset, valde quærebatur; veluti, an homo, aut fundus, aut toga, alterius rei pretium esse possit? Et Sabinus et Cassius etiam in alia re putabant pretium posse consistere: unde illud, quod vulgo dicebatur, permutatione rerum emptionem et venditionem contrahi: eamque speciem emptionis et venditionis vetustissimam esse. Argumentoque utebantur Græco poeta Homero, qui aliquam partem exercitus Achivorum vinum sibi comparasse ait, permutatis quibusdam rebus, his verbis.

Νηες δ' εκ Λημνοιο παρεσταθαν οινον αγυθαι.
Ενθεν αρ ὠνιζοντο καρηκομοωντες Αχαιοι,
Αλλοι μεν χαλκω, αλλοι δ' αιθωνι σιδηρω,
Αλλοι δε ρωοις, αλλοι δ' αυτοισι βοεσσιν,
Αλλοι δ' ανδραποδεσσι.

Hoc est.

Naves autem e Lemno appulerunt vinum vehentes:
Illinc vinum emebant *Achivi comantes caput,*
Alii quidem ære, alii autem ferro nigro,
Alii pellibus, alii ipsis bobus,
Alii etiam mancipiis. Iliad. VII.

Diversæ

Diverſæ ſcholæ auctores contra ſentiebant; aliudque eſſe exiſtimabant permutationem rerum, aliud emptionem et venditionem: alioqui non poſſe rem expediri, permutatis rebus, quæ videatur res væniſſe, et quæ pretii nomine data eſſe; nam, utramque videri et væniſſe et pretii nomine datam eſſe, rationem non pati. Sed Proculi ſententia, dicentis, permutationem propriam eſſe ſpeciem contractus a venditione ſeparatam, merito prævaluit: cum et aliis Homericis verſibus adjuvabatur, et validioribus rationibus argumentabatur. Quod et anteriores Divi Principes admiſerunt, et in noſtris Digeſtis latius ſignificatur.

§ 2. *The price of any thing bought ſhould conſiſt of money told: for it hath been much doubted, whether the price of goods can be ſaid to be paid, if any other thing is given for them than money; as, for inſtance, whether a ſlave, a piece of ground, or a robe, can be paid, as the price of a thing. The lawyers* Sabinus *and* Caſſius *thought, that a price might conſiſt of any thing, and from hence it has been commonly ſaid, that* emptio-venditio, *or buying and ſelling, is contracted by commutation, and that this ſpecies of buying and ſelling is the moſt antient. The advocates for this ſide of the queſtion quote* Homer, *who relates in the following lines, that a part of the Grecian army* bought *wine by giving other things in exchange for it.*

Wine the reſt *purchaſed* at their proper coſt,
And well the plenteous freight ſupplied the hoſt:
Each in exchange proportioned treaſures gave,
Some braſs or iron, ſome an ox or ſlave. *Pope.*

But the lawyers of another ſect maintained the contrary, and declared, that commutation was one thing, and emptio-venditio *another; for otherwiſe ſaid they, in the commutation of any two things it can never appear, which has been ſold, and which has been given, as the price of the thing ſold; and it is contrary to reaſon, that each ſhould appear to have been ſold, and that each alſo ſhould appear to have been given, as the price of the other. And the opinion of* Proculus, *who maintained, that commutation is a ſpecies of contract, ſeparate from vendition, hath deſervedly prevailed: for he is ſupported by other verſes from* Homer, *and has inforced his opinion with the ſtrongeſt arguments; and this is the doctrine, which our predeceſſors, the emperors* Dioclefian *and* Maximian, *have admitted, as it appears more at large in our Digeſts.*

Sabinus et Caſſius.] Theſe lawyers were of opinion, that emption and vendition might be contracted by an exchange of property, without the intervention of money; and in ſupport of their opinion they uſed this argument: that, if there was ſuch a contract as buying and ſelling, before any coin was made uſe of, it is plain that money, or coin, is not eſſential to buying and ſelling. And to prove the antiquity of emption and vendition they urge the authority of Homer, who ſays, that the Greeks bought wine at *Lemnos* by giving braſs, iron, oxen, and ſlaves in exchange for it. And it is obſervable, that Homer in this place uſes the word ωνιζοντο, which is but an ambiguous expreſſion. But there is a paſſage in the *Odyſſ.* urged by *Paulus*, which is much more appoſite.

Την ποτε Λαερτης πριατο κτεατεσσιν εοισιν.

i. e. the ſlave *Euryclea*, whom *Laertes* bought with his poſſeſſions. *Odyſ. lib.* 1. *ſub. fin.*

In this verſe there can be no doubt of the ſenſe of πριατο; and, as to κτεατεσσιν, the poet in the next line aſcertains the meaning of it by informing us, that twenty oxen were given for her.

But thoſe, who hold a contrary opinion to that of *Caſſius* and *Sabinus*, quote *Homer* alſo in their turn; particularly that paſſage in the 6th *Iliad*, where *Diomed* and *Glaucus* exchange their armour.

Ος προς Τυδειδην Διομηδεα τευχε' αμειβε,
Χρυσεα Χαλκειων, εκατομβοι εννεαβοιων.
For Diomed's braſs arms exchanged his own,
Tho' wrought with gold and worth an hundred beeves.

But, (ſays *Vinny*,) if the poets only were to be regarded in this diſpute, little could be collected from them; *quippe, dum metro ſerviunt, verborum proprietatem ſæpe negligere coguntur.* And, if we attend to the ſuggeſtions of truth and right reaſon, we muſt ſoon be convinced, that the contracts of buying and ſelling can never be ſtrictly ſaid to exiſt, without the intervention of money, which was undoubtedly in uſe long before the Trojan war. *Vinn.*

In noſtris Digeſtis.] *ff.* 18. *t.* 1. *De contrahenda emptione.*

De periculo et commodo rei venditæ.

§ III. Cum autem emptio et venditio contracta ſit, (quod effici diximus ſimul atque de pretio convenerit, cum ſine ſcriptura res agitur,) periculum rei venditæ ſtatim ad emptorem pertinet, tametſi adhuc ea res emptori tradita non ſit. Itaque, ſi homo mortuus ſit, vel aliqua parte corporis læſus fuerit, aut ædes totæ, vel aliqua ex parte, incendio conſumptæ fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatus ſit, ſive etiam inundatione aquæ, aut arboribus turbine dejectis, longe minor aut deterior eſſe cœperit, emptoris damnum eſt, cui neceſſe eſt, licet rem non fuerit nactus, pretium ſolvere. Quicquid enim ſine dolo et culpa venditoris accidit, in eo venditor ſecurus eſt. Sed et, ſi poſt emptionem fundo aliquid per alluvionem acceſſerit, ad emptoris commodum pertinet: nam et commodum ejus eſſe debet, cujus periculum eſt. Quod ſi fugerit homo, qui væniit, aut ſurreptus fuerit, ita ut neque dolus, neque culpa venditoris, intervenerit, animadvertendum erit, an cuſtodiam ejus uſque ad traditionem venditor ſuſceperit. Sane enim ſi ſuſceperit, ad ipſius periculum is caſus pertinet: ſi non ſuſceperit, ſecurus eſt. Idem et in cæteris animalibus cæteriſque rebus intelligimus. Utique tamen vindicationem rei et condictionem exhibere debebit emptori: quia ſane, qui nondum rem emptori tradidit, adhuc ipſe dominus eſt. Idem etiam eſt de furti et de damni injuriæ actione.

§ 3. *When emption and vendition are once contracted, (and this, as we have obſerved, is effected, as ſoon as the price is agreed upon, when there is no covenant in writing,) then the buyer is liable to the riſque of the loſs of the thing ſold, or of the damage, which may happen to it, altho' it hath not been delivered to him. And therefore, if a ſlave, thus ſold, ſhould die, or receive any hurt, or if a building, or part of it, ſhould be conſumed by fire, or if lands ſold, or any portion of them, ſhould be waſhed away by a torrent, or be made worſe by an inundation, or a ſtorm, which may deſtroy the trees, the loſs in all theſe caſes muſt be ſuſtained by the buyer, who is obliged to pay the price agreed upon, altho' he never had poſſeſſion of the thing: for whatever the accident is, if it happens neither by the fraud, nor fault of the ſeller, he is ſecure. But on the other hand, if, after the ſale, any acceſſion is made to the lands by alluvion or otherwiſe, this increaſe becomes the gain of the buyer; for it is juſt, that he ſhould receive the profit, who muſt have ſuſtained the loſs. But, if a ſlave, who is ſold, either runs away or is ſtolen, and neither fraud nor negligence can be imputed to the ſeller, it muſt be inquired, whether the ſeller undertook the ſafe cuſtody of the ſlave, till delivery ſhould be made; if he did, he is anſwerable for the accident; if he did not, he is ſecure. The ſame law takes place in regard*

to

to all other animals and things. But, when theſe accidents happen, and the buyer is to ſuſtain the loſs, the ſeller is obliged to make over his right of vindication and condiction; that is, he muſt transfer to the buyer all right of action, whether real or perſonal, if neceſſary; for he, who has not delivered the thing ſold, is ſtill conſidered as the proprietor of it. Actions alſo of theft, or damage done, muſt be transfered by the ſeller to the buyer, when the Thing ſold is ſtolen, or damaged, before delivery.

De emptione conditionali.

§ IV. Emptio tam ſub conditione quam pure contrahi poteſt: ſub conditione, veluti, *ſi Stichus intra certum diem tibi placuerit, erit tibi emptus aureis tot.*

§ 4. *A ſale may be contracted conditionally, as well as purely: for inſtance, when the perſon, who is inclined to ſell, ſpeaks thus*; if within a certain time you ſhall approve of the ſlave STICHUS, he ſhall be yours for ſo many AUREI.

De emptione rei, quæ non eſt in commercio.

§ V. Loca ſacra, vel religioſa, item publica, (veluti forum, baſilicam,) fruſtra quis ſciens emit: quæ tamen ſi pro profanis vel privatis deceptus a venditore quis emerit, habebit actionem ex empto, quod non habere ei liceat, ut conſequatur, quod ſua intereſt, eum deceptum non eſſe. Idem juris eſt, ſi hominem liberum pro ſervo emerit.

§ 5. *Whoever knowingly purchaſes a place ſacred, or religious, or a public place, ſuch as a* Forum *or court of juſtice, he makes a void purchaſe. But, if a man ſhould purchaſe any of the before-mentioned places, having taken them for profane or private, being impoſed upon by the ſeller, then ſuch purchaſer, not being able to enjoy the poſſeſſion of what he has bought, may have an action* ex empto *againſt the ſeller, and recover the damage ſuffered by the deceit. The ſame law alſo obtains, if any perſon, thro' error, ſhould buy a freeman inſtead of a ſlave.*

TITULUS VIGESIMUS-QUINTUS.

De locatione et conductione.

D. xix. T. 2. C. iv. T. 65. C. ii. T. 70

Collatio emptionis, et locationis. De mercedis conventione.

LOCATIO et conductio proxima eſt emptioni et venditioni, iiſdemque juris regulis conſiſtit. Nam ut emptio et venditio ita contrahitur, ſi de pretio convenerit, ſic et locatio et conductio ita contrahi intelligitur, ſi merces conſtituta ſit. Et competit locatori quidem locati actio, conductori vero conducti.

Loca-

Location *and* conduction, *i. e. letting and hireing, are nearly allied to* emption *and* vendition, *i. e, to buying and ſelling; and are governed by the ſame rules; for as emption and vendition are contracted as ſoon as the price of the thing is agreed upon, ſo location and conduction are contracted, when the hire is once fixed by the parties. The* locator, *or perſon who lets, is intituled to an action, called* actio locati, *if he is aggreived by the* conductor *or hirer; and the conductor may have an action called* actio conducti, *againſt the* locator.

De mercede collata in arbitrium alienum.

§ I. Et, quæ ſupra diximus, ſi alieno arbitrio pretium permiſſum fuerit, eadem et de locatione et de conductione dicta eſſe intelligimus, ſi alieno arbitrio merces permiſſa fuerit. Qua de cauſa, ſi fulloni polienda curandave, aut ſarcinatori ſarcienda, veſtimenta quis dederit, nulla ſtatim mercede conſtituta, ſed poſtea tantum daturus, quantum inter eos convenerit, non proprie locatio et conductio contrahi intelligitur; ſed eo nomine actio *præſcriptis verbis* datur.

§ 1. *We are willing, that what we have before obſerved in regard to the ſale of a thing, when the price is refered to a third perſon, ſhould alſo be underſtood to have been ſaid of* location *and* conduction, *when the quantity of the hire is not agreed upon between the parties, but left to arbitration. And therefore, if a man ſends his cloaths to a fuller to be ſcoured, or to a taylor to be mended, and does not previouſly agree upon any price, in this caſe* location *and* conduction *are not underſtood to be properly contracted; but an action may be brought by either party,* præſcriptis verbis, *i. e. in words preſcribed and adapted to the circumſtances of the caſe.*

Actio præſcriptis verbis.] "Dicta eſt actio "*præſcriptis verbis*, ex eo, quod præſcriptis ver- "bis rem geſtam demonſtret. Ob eandem "quoque cauſam hæc actio dicitur *in factum*; "et interdum plena oratione *actio utilis præſcrip- "tis verbis in factum.*" *Vinn.*

In quibus rebus merces conſiſtat.

§ II. Præterea, ſicut vulgo quærebatur, an permutatis rebus emptio et venditio contraheretur, ita quæri ſolebat de locatione et conductione, ſi ſorte rem aliquam utendam ſive fruendam tibi aliquis dederit, et invicem à te utendam ſive fruendam aliam rem acceperit. Et placuit, non eſſe locationem et conductionem, ſed proprium genus contractus: veluti, ſi, cum unum bovem quis haberet, et vicinus ejus item unum, placuerit inter eos, ut per denos dies invicem boves commodarent, ut opus facerent, et apud alterum alterius bos perierit; neque locati, neque conducti, neque commodati competit actio; quia non fuit commodatum gratuitum: verum præſcriptis verbis agendum eſt.

§ 2. *As it was formerly a queſtion, whether* emption *and* vendition *could be contracted by an exchange of things, ſo it hath alſo been doubted, whether* location *and* conduction *can be ſaid to exiſt, when one man lends another a particular thing for his uſe, and receives in return ſome other thing, of which he is alſo permitted to have the uſe, and it has been determined, that this exchange does not conſtitute* location *and* conduction, *but is a diſtinct ſpecies of contract: for example, if two neighbours have each of them an ox, and each agrees to lend his ox to the other*

other alternately for ten days, to do the labors of the field, and the ox of the one dies in the poſſeſſion of the other, in this caſe, he, who has loſt his ox, can neither bring the action locati, *nor* conducti, *nor even the action* commodati ; *for the ox was not lent gratuitouſly ; but he may ſue by virtue of an action called* præſcriptis verbis ; *i. e. by an action upon the caſe.*

De Emphyteuſi.

§ III. Adeo autem aliquam familiaritatem inter ſe videntur habere emptio et venditio, item locatio et conductio, ut in quibuſdam cauſis quæri ſoleat, utrum emptio et venditio contrahatur, an locatio et conductio: ut ecce de prædiis, quæ perpetuo quibuſdam fruenda traduntur, id eſt, ut, quamdiu penſio ſive reditus pro his domino præſtetur, neque ipſi conductori, neque hæredi ejus, cuive conductor hæreſve ejus id prædium vendiderit, aut donaverit, aut dotis nomine dederit, aliove quocunque modo alienaverit, auferre liceat. Sed talis contractus, quia inter veteres dubitabatur, et a quibuſdam locatio, a quibuſdam venditio exiſtimabatur, lex Zenoniana lata eſt, quæ emphyteuſeos contractus propriam ſtatuit naturam, neque ad locationem, neque ad venditionem inclinantem, ſed ſuis pactionibus fulciendam: et, ſi quidem aliquid pactum fuerit, hoc ita obtinere, ac ſi naturalis eſſet contractus: ſin autem nihil de periculo rei fuerit pactum, tunc, ſiquidem totius rei interitus acceſſerit, ad dominum ſuper hoc redundare periculum: ſin autem particularis, ad emphyteuticarium hujuſmodi damnum venire ; quo jure utimur.

§ 3. *The contract of buying and ſelling, and that of letting and hiring, are ſo nearly connected, that, in ſome caſes, it has been difficult to diſtinguiſh the one from the other: as when lands have been demiſed to be enjoyed for ever, upon condition, that, if a certain yearly penſion, or rent, is conſtantly paid to the proprietor, it ſhall not be in his power to take theſe lands from the tenent or his heirs, or from any other perſon, to whom ſuch tenent or his heirs ſhall have ſold them, given them gratuitouſly, or as a marriage portion, or otherwiſe diſpoſed of them. But, when this contract, concerning which the antient lawyers had great doubts, was by ſome thought to be an emption and vendition, and by others a location and conduction, the* Zenonian *law was enacted, which ſettled the proper nature of an* emphyteuſis, *making it to be neither the one nor the other of the before mentioned contracts, but declaring it to be ſupported by it's own peculiar covenants, and ordaining, that whatever is agreed upon by the parties ſhall obtain and take place, as a contract: and when there is no covenant, which declares, upon whom the loſs of the lands ſhall fall, that then, if the whole eſtate happens to be deſtroyed by a torrent, an earthquake, or any other means, the proprietor muſt be the ſufferer ; but, if a part only is deſtroyed, that the loſs ſhall then be borne by the tenent ; and this is the law in uſe.*

Emphyteuſeos contractus.] An *emphyteuſis* (from εμφυτευειν to plant) is a contract made by conſent, by which houſes or lands are given to be poſſeſſed for ever, or at leaſt for a long term, upon condition, that the lands ſhall be improved, and that a ſmall yearly rent or penſion ſhall be paid to the proprietor. And this penſion, rent, or canon, may be paid in money, grain, or any other thing. The perpetuity, or long term, granted, diſtinguiſhes this contract from letting and hireing: for an *emphyteuſis* was originally made on account of barren lands, which no perſon would take for a ſhort time, thro' a fear of the charge of cultivation; but afterwards the

beſt lands were often granted out upon this emphyteutical contract; the nature of which was firſt fixed by the emperor *Zeno*, who determined it to be a diſtinct contract from buying and ſelling, letting and hireing. *vid. Cod.* 4. *t.* 66. *De jure emphyteutico.* For ſome thought it to be the contract of hireing, when they conſidered, that a rent was paid for it to the proprietor: and others imagined it to be the contract of buying, when they ſaw the tenent had a perpetuity, or at leaſt a very long time, and a ſort of property in it: but the tenent had only *utile dominium*, not a direct dominion; and therefore the contract was diſtinct from buying and ſelling.

The tenent is called *emphyteuta*, being under an obligation to plant and improve the land; and he has ſuch an intereſt, that he may ſell the profits of his right in the eſtate to another, with the conſent of the proprietor, to whom two months muſt be allowed to determine whether he will himſelf become the purchaſer. But, when there is a new tenent, a *laudimium*, (which is almoſt the ſame as a relief, and generally amounts to the value of the 50th part of the eſtate,) muſt be paid to the proprietor by the new tenent, as an acknowledgment for being put into poſſeſſion. *Cod.* 4. *t.* 66. *l.* 3.

There is alſo a penſion or rent called a *canon*, which muſt be paid annually, as an acknowledgment of a ſuperior title; and this *canon* is always due every year, whether the tenent receives any profits or not: for it is not paid, in conſideration of profits received, but as an acknowledgment of the tenure.

The *emphyteuſis* of the Roman law ſeems to have given riſe to our fee-farm and copyhold eſtates in *England*.

Wood's Com. Law. Page 339.

De forma alicui facienda ab artifice.

§ IV. Item quæritur, ſi cum aurifice Titius convenerit, ut is ex auro ſuo certi ponderis certæque formæ annulos ei faceret, et acciperet, verbi gratia, decem aureos, utrum emptio et venditio, an locatio et conductio contrahi videatur? Caſſius ait, materiæ quidem emptionem et venditionem contrahi, operæ autem locationem et conductionem. Sed placuit, tantum emptionem et venditionem contrahi. Quod ſi ſuum aurum Titius dederit, mercede pro opera conſtituta, dubium non eſt, quin locatio et conductio ſit.

§ 4. *Alſo, if* Titius, *for example, ſhould agree with a goldſmith to make a certain number of rings, of a particular ſize and weight, and to furniſh the gold, for which* Titius *ſhould promiſe him ten* aurei, *as the value both of the workmanſhip and the gold, it hath been a queſtion, whether ſuch a contract would be a buying and ſelling, or a letting and hireing.* Caſſius *was of opinion, that it would be a buying and ſelling in regard to the matter, and a letting and hireing in regard to the work: but it is now ſettled, that, in this caſe, an emption and vendition would only be contracted. But, on the other hand, it is not to be doubted, that, if* Titius *ſhould give his own gold, and agree to pay only for the workmanſhip, this contract would be a location and conduction.*

Quid præſtare debet conductor.

§ V. Conductor omnia ſecundum legem conductionis facere debet: et, ſi quid in lege prætermiſſum fuerit, id ex bono et æquo præſtare. Qui pro uſu aut veſtimentorum, aut argenti, aut jumenti, mercedem aut dedit aut promiſit, ab eo cuſtodia talis deſideratur, qualem diligentiſſimus pater familias ſuis rebus adhibet; quam ſi præſtiterit, et aliquo caſu fortuito eam rem amiſerit, de reſtituenda ea non tenebitur.

§ 5. *The conductor, or hirer, is not only obliged to obſerve ſtrictly the covenants of the conduction, but is alſo bound in equity to perform whatever hath been omited to be inſerted. And whoever has given or promiſed hire for the uſe of cloaths, ſilver, horſes,*

horſes, &c. is bound to take the ſame care of them, as the moſt diligent maſter of a family would take of his own property. But, if the hirer does this, and yet loſes the things hired by ſome fortuitous event, he ſhall not be anſwerable for the loſs.

De morte conductoris.

§. VI. Mortuo conductore intra tempora conductionis, hæres ejus eodem jure in conductione ſuccedit.

§ 6. *If the conductor, or hirer, dies before the time of the conduction is expired, his heir ſuccedes to his right, and is intituled to the thing hired, for the remainder of the term.*

TITULUS VIGESIMUS-SEXTUS.

De ſocietate.

D.xvii. T. 2. C.iv. T. 37.

Diviſio a materia.

SOCIETATEM coire ſolemus aut totorum bonorum, quam Græci ſpecialiter κοινωνιαν appellant; aut unius alicujus negotiationis, veluti mancipiorum vendendorum emendorumque, aut olei, aut vini, aut frumenti emendi vendendique.

It is common for perſons to enter either into a general partenerſhip or ſociety of all their goods, and this the greeks emphatically call κοινωνιαν, *i. e. communion; or into a particular partenerſhip, which regards only ſome ſingle ſpecies of commerce, as that of buying and ſelling ſlaves, oil, wine, or corn.*

De partibus lucri et damni.

§ I. Et quidem, ſi nihil de partibus lucri et damni nominatim convenerit, æquales ſcilicet partes et in lucro et in damno ſpectantur: quod ſi expreſſæ fuerint partes, hæ ſervari debent. Nec enim unquam dubium fuit, quin valeat conventio, ſi duo inter ſe pacti ſint, ut ad unum quidem duæ partes et lucri et damni pertineant, ad alterum tertia.

§ 1. *If no expreſs agreement has been made by the parteners concerning their ſhares of profit and loſs; the loſs muſt be equally borne, and the profit muſt be equally divided. But, if any particular agreement has been made, it muſt be obſerved; for it was never yet doubted, but that the covenant would be binding, if two perſons ſhould agree, that two ſhares of the profit and loſs ſhould belong to one partener, and that only the third part of both ſhould belong to the other.*

De partibus inæqualibus.

§ 2. De illa ſane conventione quæſitum eſt, ſi Titius et Seius inter ſe pacti ſint, ut ad Titium lucri duæ partes pertineant, damni tertia, ad Seium duæ partes damni, lucri tertia, an rata debeat haberi conventio? Quintus Mucius contra naturam ſocietatis talem pactionem eſſe exiſtimavit, et ob id non eſſe ratam habendam: Servius Sulpitius (cujus ſententia prævaluit) contra ſenſit; quia ſæpe quorundam ita pretioſa eſt opera in ſocietate, ut eos juſtum ſit conditione meliore in ſocietatem admitti. Nam et ita poſſe coiri ſocietatem non dubitatur, ut alter pecuniam conferat, alter non conferat, et tamen lucrum inter eos commune ſit: quia ſæpe opera alicujus pro pecunia valet. Et adeo contra Quinti Mucii ſententiam obtinuit, ut illud quoque conſtiterit poſſe convenire, ut quis lucri partem ferat, de damno non teneatur: quod et ipſum Servius convenienter ſibi fieri exiſtimavit. Quod tamen ita intelligi oportet, ut, ſi in alia re lucrum, in alia damnum illatum ſit, compenſatione facta, ſolum quod ſupereſt, intelligatur lucro eſſe.

§ 2. *But, it has been queſtioned, if* Titius *and* Seius *ſhould covenant between themſelves, that* Titius *ſhould receive two parts of the profit and bear but a third of the loſs, and that* Seius *ſhould bear two parts of the loſs, and receive but a third ſhare of the profit, whether ſuch an agreement would be binding?* Quintus Mucius *was of opinion, that ſuch a covenant was contrary to the nature of partenerſhip, and ought not therefore to be ratified; but* Servius Sulpitius. *whoſe opinion hath prevailed, thought otherwiſe, and for this reaſon; becauſe the labor of ſome is ſo highly valuable, that it is but juſt, that they ſhould be admited into ſociety upon the moſt advantageous conditions; for no man doubts, but that partenerſhip may be entered into by two perſons, when one of them only finds money, inaſmuch as the work, and labor of the other, amounts to the value of it, and ſupplies it's place. And alſo, contrary to the opinion of* Mucius, *it hath obtained as law, that a partener may by agreement take a ſhare of the profit, and not be accountable for any part of the loſs; for* Servius *thought, that this likewiſe might be done equitably: but it muſt be ſo underſtood, that, if profit accrues from one ſpecies of things and loſs from another, only what remains, after the loſs is compenſated, ſhall be looked upon as profit.*

De partibus expreſſis in una cauſa.

§ III. Illud expeditum eſt, ſi in una cauſa pars fuerit expreſſa, (veluti in ſolo lucro, vel in ſolo damno,) in altera vero omiſſa, in eo quoque, quod prætermiſſum eſt, eandem partem ſervari.

§ 3. *It is alſo a ſettled point, that, if parteners expreſsly mention their ſhares in one reſpect only, either ſolely in regard to gain, or ſolely in regard to loſs, their ſhares of that, which is omited, ſhall be the ſame as of that, which is mentioned.*

Qui-

Quibus modis ſocietas ſolvitur. De renuntiatione.

§ IV. Manet autem ſocietas eo uſque, donec in eodem conſenſu perſeveraverint. At, cum aliquis renuntiaverit ſocietati, ſolvitur ſocietas. Sed plane, ſi quis callide in hoc renuntiaverit ſocietati, ut obveniens aliquod lucrum ſolus habeat; veluti, ſi totorum bonorum ſocius, cum ab aliquo hæres eſſet relictus, in hoc renuntiaverit ſocietati, ut hæreditatem ſolus lucri faceret, cogitur hoc lucrum communicare. Si quid vero aliud lucri faciat, quod non captaverit, ad ipſum ſolum pertinet. Ei vero, cui renuntiatum eſt, quicquid omnino poſt renuntiatam ſocietatem acquiritur, ſoli conceditur.

§ 4. *A partenerſhip laſts as long as the parteners perſevere in their conſent to continue ſuch; and, if one of them renounces the partenerſhip, the ſociety is diſſolved. But, if a man renounces with a fraudulent intent, and for no other end, but that he may enjoy the ſole benefit of ſome future fortune, which he expects, his renunciation will not avail: for, if a partener in common, as ſoon as he finds, that he has been appointed an heir, ſhould renounce his partenerſhip, that he may poſſeſs the inheritance excluſive of all others, he would neverthelefs be compelled to divide the inheritance equally with his former parteners: yet, if an inheritance, which he did not expect, ſhould by accident fall to him after renunciation, the whole would be his own. But thoſe, from whom a partener hath ſeparated himſelf by renouncing, poſſeſs ſolely for themſelves whatever they acquire, after the renunciation of that partener.*

De morte.

§ V. Solvitur adhuc ſocietas etiam morte ſocii: quia, qui ſocietatem contrahit, certam perſonam ſibi eligit. Sed et, ſi conſenſu plurium ſocietas contracta ſit, morte unius ſocii ſolvitur, etſi plures ſuperſint: niſi in coeunda ſocietate aliter convenerit.

§ 5. *A partenerſhip is alſo diſſolved by the death of one of the parteners; for he, who enters into partenerſhip always chuſes ſome certain known perſon to be his partener, upon whom he can depend. And, altho a partenerſhip is entered into by the conſent of many, it is neverthelefs diſſolved by the death of one, altho' the reſt ſurvive; and this is the law, unleſs ſpecial covenants are made to the contrary at the time of forming the ſociety.*

De fine negotii.

§ VI. Item, ſi alicujus rei contracta ſocietas ſit, et finis negotio impoſitus eſt, finitur ſocietas.

§ 6. *Alſo, if a partenerſhip is entered into on account of ſome particular commerce, and an end is put to that commerce, the partenerſhip is of courſe ended.*

De publicatione.

§ VII. Publicatione quoque diſtrahi ſocietatem, manifeſtum eſt, ſcilicet ſi univerſa bona ſocii publicentur: nam, cum in ejus locum alius ſuccedat, pro mortuo habetur.

§ 7.

§ 7. *It is likewiſe manifeſt, that a partenerſhip is diſſolved by confiſcation; to wit, if all the goods of a partener are confiſcated; for when another [for example, the treaſurer of the exchequer] ſuccedes in his place, he is reputed as civilly dead.*

De ceſſione bonorum.

§ VIII. Item, ſi quis ex ſociis mole debiti prægravatus bonis ſuis ceſſerit, et ideo propter publica et privata debita ſubſtantia ejus væneat, ſolvitur ſocietas. Sed hoc caſu, ſi adhuc conſentiant in ſocietatem, nova videtur incipere ſocietas.

§ 8. *Alſo, if a man in partenerſhip, being preſſed by his debts, makes a ceſſion or a ſurrender of his goods, and they are ſold to ſatisfie either public or private demands, the partenerſhip is diſſolved. But, if the reſt of the coparteners ſhould ſtill deſire to be in ſociety either with or without this man, the firſt partenerſhip would not continue, but a new one would commence.*

Bonis ſuis ceſſerit.] In *England* the benefit of ceſſion, or bankruptcy, is allowed only to perſons concerned in trade, who may be diſcharged from their debts, if they ſurrender themſelves, and make a full diſcovery of their goods, books, papers, &c. for the benefit of their creditors; and alſo conform themſelves in all other reſpects to certain ſtatutes of the realm, by which all poſſible care has been taken to prevent fraudulent bankruptcies, by making it felony without benefit of the clergy, to be guilty of any willful omiſſion in their diſcoveries. *Hawk. pl. cap.* 57. 4. *Ann. cap.* 17. *Inſt.* 4. *tit.* 6.

De dolo et culpa a ſocio præſtandis.

§. IX. Socius ſocio utrum eo nomine tantum teneatur pro ſocio actione, ſi quid dolo commiſerit, ſicut is, qui deponi apud ſe paſſus eſt, an etiam culpæ, id eſt, deſidiæ atque negligentiæ nomine, quæſitum eſt? Prævaluit tamen, etiam culpæ nomine teneri eum. Culpa autem non ad exactiſſimam diligentiam dirigenda eſt: ſufficit enim talem diligentiam communibus rebus adhibere ſocium, qualem ſuis rebus adhibere ſolet. Nam, qui parum diligentem ſocium ſibi adſumit, de ſe queri, ſibique hoc imputare, debet.

§ 9. *It has been a queſtion, whether a partener, like a depoſitary, is accountable for fraud only, or whether he is alſo accountable for his negligence? And it now prevails, that he is anſwerable for all the damages, which happen through his fault. And, if a man fails in having uſed the moſt exact diligence, ſuch a failure is not comprehended under the term* culpa, *or fault: for a partener is not liable to anſwer damages, if, in regard to the goods of the community, it appears, that he has uſed the ſame care and diligence towards them, which he has uſually obſerved in keeping his own private property. And it is certain, that whoever chuſes a negligent man for his partener, can lay the blame upon himſelf only and impute his misfortune to his own ill choice.*

TITULUS VIGESIMUS-SEPTIMUS.

De mandato.

D. xvii. T. 1. C. iv. T. 35.

Divisio a fine.

MANDATUM contrahitur quinque modis, sive sua tantum gratia aliquis tibi mandet, sive sua et tua, sive aliena tantum, sive sua et aliena, sive tua et aliena. At, si tua tantum gratia tibi mandatum sit, supervacuum est mandatum; et ob id nulla ex eo obligatio, nec mandati inter vos actio nascitur.

A mandate is framed five ways: either when it is given solely for the benefit of the mandator, or partly for his benefit, and partly for that of the mandatary; or solely for the service of some third person; or partly for the profit of the mandator and partly for the service of a third person; or for the benefit of the mandator, and partly for the use of a third person. But, if a mandate is given solely for the sake of the mandatary, the mandate is useless; for no obligation can arise from it, nor of course any action.

Si mandantis gratia mandetur.

§ I. Mandantis tantum gratia intervenit mandatum, veluti si quis tibi mandet, ut negotia ejus gereres, vel ut fundum ei emeres, vel ut pro eo sponderes.

§ 1. *A mandate is given solely for the benefit of the mandator, when he requires the mandatary to transact his business, to buy lands, or to become a surety for him.*

Si mandantis et mandatarii.

§ II. Tua gratia et mandantis; veluti si mandet tibi, ut pecuniam sub usuris crederes ei, qui in rem ipsius mutùaretur: aut si, volente te agere cum eo ex fidejussoria causa, mandet tibi, ut cum reo agas periculo mandantis; vel ut ipsius periculo stipuleris ab eo, quem tibi deleget in id, quod tibi debuerat.

§ 2. *A mandate is given partly for the benefit of the mandator, and partly for the benefit of the mandatary, if the mandator requires you to lend money upon interest to* Titius, *who would borrow it for the use of the mandator; or if, when you are upon the point of suing a man on account of a fide-jussory caution, or a suretyship, he should authorise you at his own risque to sue the principal debtor: or if he should impower you at his own hazard to stipulate for the sum, which he owes you, from some other person, whom he appoints.*

Ut pecuniam ſub uſuris.] " Nam mandatario prodeſt id, quod agitur, propter uſurarum " præſtationem, et mandatori, in cujus rem pecunia vertenda eſt." *Theoph.*

Aut ſi volente te.] " Commodum hic fidejuſſoris in eo, quod judicio liberatur, cum alioqui agi cum eo ex cauſa fide-juſſionis potuiſſet, reo principali neglecto: ſi quidem jure veteri fide-juſſor ante reum principalem conveniri potuit." *Vinn.*

Vel ut ipſius periculo.] " Hoc etiam mandatum in rem utriuſque interponi intelligitur: " in rem debitoris mandantis, quia ea delegatione fit novatio, atque ex priore cauſa debitor " liberatur: in rem creditoris mandatarii, quoniam novus debitor ita ſubſtituitur, ut nihilominus ex ſequenti mandato cum priore agi " poſſit." *Vinn.*

Si aliena gratia.

§ III. Aliena tantum cauſa intervenit mandatum; veluti ſi tibi aliquis mandet, ut Titii negotia gereres, vel ut Titio fundum emeres, vel ut pro Titio ſponderes.

§ 3. *A mandate is interpoſed only for the ſake of a third perſon, when the mandator requires the mandatary to perform ſome office for* Titius, *to buy lands for him, or to become his bail.*

Si mandantis et aliena.

§ IV. Sua et aliena; veluti ſi de communibus ſuis et Titii negotiis gerendis tibi mandet, vel ut ſibi et Titio fundam emeres, vel ut pro eo et Titio ſponderes.

§ 4. *A mandate tends to the benefit of the mandator, and alſo of a third perſon, when the mandator requires you, who are the mandatary, to tranſact ſome affair for the common benefit of both him and* Titius, *or to buy lands for them both, or to be bound for them.*

Si mandatarii et aliena.

§ V. Tua et aliena; veluti ſi tibi mandet, ut Titio ſub uſuris crederes; quia, ſi ſine uſuris pecuniam crederes, aliena tantum gratia intercedit mandatum.

§ 5. *A mandate is given in favor of the mandatary and of a third perſon, when the mandator requires you to lend money to* Titius, *upon intereſt; but, if you are required to lend money without intereſt, the mandate can only be in favor of him, to whom it is lent.*

Si mandatarii.

§. VI. Tua tantum gratia intervenit mandatum; veluti ſi tibi mandet, ut pecunias tuas in emptiones potius prædiorum colloces, quam fœneres: vel ex diverſo, ut pecunias tuas fœneres potius, quam in emptiones prædiorum colloces. Cujus generis mandatum magis conſilium, quam mandatum eſt, et ob id non eſt obligatorium; quia nemo ex conſilio mandati obligatur, etiam ſi non expediat ei, cui mandabatur, cum liberum cuique ſit apud ſe explorare, an ſibi expediat conſilium. Itaque, ſi otioſam pecuniam domi te habentem hortatus fuerit aliquis, ut rem aliquam emeres vel eam crederes, quamvis non expediat eam tibi emiſſe, vel credidiſſe, non

tamen

tamen tibi mandati tenetur. Et adeo hæc ita ſunt, ut quæſitum ſit, an mandati teneatur, qui mandavit tibi, ut pecuniam Titio fœnerares. Sed obtinuit Sabini ſententia, obligatorium eſſe in hoc caſu mandatum: quia non aliter Titio credidiſſes, quam ſi tibi mandatum eſſet.

§ 6. *A mandate is given ſolely for your own benefit, if the mandator requires you rather to make a purchaſe of lands, than to lend your money upon intereſt; or on the contrary rather to lend your money upon intereſt, than to buy lands. But a mandate of this ſpecies ſeems rather to be good advice, than a mandate; and is therefore not obligatory; for an action of mandate cannot be brought againſt a man on account of the advice, which he has given, altho it has not proved beneficial to him, to whom it was given; inaſmuch as every one is at full liberty to conſult his own reaſon, whether the counſil given to him is expedient or not. And therefore, if you ſhould be adviſed to employ your money, which now lies dead, either by lending it out at intereſt, or in making a purchaſe, and you ſhould become a loſer by following this advice, the adviſer would not be liable to an action. And this is ſo true, that it has even been a queſtion, whether an action of mandate will lie againſt him, who hath required you by mandate to lend money to* Titius, *who is inſolvent. But the opinion of* Sabinus *hath obtained, and a mandate in this caſe is now judged to be obligatory; for you would never have truſted* Titius, *but in obedience to the mandate.*

De mandato contra bonos mores.

§ VII. Illud quoque mandatum non eſt obligatorium, quod contra bonos mores eſt: veluti ſi Titius de furto, aut de damno faciendo, aut de injuria facienda, mandet tibi: licet enim pœnam iſtius facti nomine præſtiteris, non tamen ullam habes adverſus Titium actionem.

§ 7. *A mandate contrary to good manners is not obligatory; as if* Titius *ſhould command* Sempronius *to commit theft, or to do ſome act to the damage or injury of a third perſon; for, altho'* Sempronius *ſhould ſuffer a penalty or puniſhment in conſequence of his obedience to ſuch a mandate, he will not be intituled to any action againſt* Titius.

Veluti ſi Titius.] "Si Sempronius ex Titii "mandato aliquem occidit, aut vulneravit, aut "contumelia affecit, etſi hic nulla ex contractu "inter eos obligatio oritur, uterque tamen obli- "gatur ex delicto; neque Titium, qui mandavit, excuſat, quod Sempronius facinus perpetravit, neque Sempronium, quod Titius mandaverit. *Vinn.*

De executione mandati.

§ VIII. Is, qui exequitur mandatum, non debet excedere fines mandati: ut ecce, ſi quis uſque ad centum aureos mandaverit tibi, ut fundum emeres, vel ut pro Titio ſponderes, neque pluris emere debes, neque in ampliorem pecuniam fidejubere; alioqui non habebis cum eo mandati actionem: adeo quidem, ut Sabino et Caſſio placuerit, etiamſi uſque ad centum aureos cum eo agere volueris, inutiliter te acturum. Sed diverſæ ſcholæ auctores recte uſque ad centum aureos te acturum exiſtimant: quæ ſententia ſane benignior eſt. Quod ſi minoris emeris, habebis ſcilicet cum eo mandati actionem: quoniam, qui mandat, ut ſibi

centum aureorum fundus emeretur, is utique mandaſſe intelligitur, ut minoris, ſi poſſit, emeretur.

§ 8. *He, who executes a mandate ought not to exceed the bounds of it: for example, if a mandator ſhould require you to purchaſe lands, or to be bound for* Titius, *to the amount of an hundred* aurei; *you ought not to buy the lands at an higher price, or be bound for* Titius *in a greater ſum: for, if you exceed the mandate, you will not be intituled to an action for the recovery of the exceſs. And* CASSIUS *and* SABINUS *were even of opinion, that, altho' you were willing to bring an action of mandate for no more than the hundred* aurei, *you could not recover them. But it was held by the lawyers of a different ſchool, that the mandatary might ſue the mandator for the hundred* aurei; *and this appears to be the more equitable opinion. But, if you buy certain lands at a leſs price than that, which the mandator has allowed, you will undoubtedly be intituled to an action of mandate: for, if he hath ordered, that an hundred* aurei *ſhall be expended in the purchaſe of a particular eſtate, he will certainly be underſtood to have ordered, that the ſame eſtate ſhould, if poſſible, be purchaſed at a leſs price.*

De revocatione mandati.

§ IX. Recte quoque mandatum contractum, ſi, dum adhuc integra res ſit, revocatum fuerit, evaneſcit.

§ 9. *A mandate, properly contracted, becomes null, if it is revoked whileſt* intire; *that is, before any act has been done in conſequence of it.*

De morte.

§ X. Item, ſi adhuc integro mandato mors alterius interveniat, id eſt, vel ejus, qui mandaverit, vel illius, qui mandatum ſuſceperit, ſolvitur mandatum. Sed utilitatis cauſa receptum eſt, ſi eo mortuo, qui tibi mandaverat, tu, ignorans eum deceſſiſſe, executus fueris mandatum, poſſe te agere mandati actione: alioqui juſta et probabilis ignorantia tibi damnum afferet. Et huic ſimile eſt, quod placuit, ſi debitores, manumiſſo diſpenſatore Titii, per ignorantiam liberto ſolverint, liberari eos; cum alioqui ſtricta juris ratione non poſſent liberari: quia alii ſolviſſent, quam cui ſolvere debuerint.

§ 10. *A mandate alſo becomes null, if either the* mandator, *or the mandatary, dies, whileſt it continues intire. But it is allowed for the benefit of ſociety, that, if a mandator dies, and the mandatary, not knowing of his death, ſhould afterwards execute the mandate, he may bring his action againſt the heirs of the* mandator: *for otherwiſe an unblameable and unavailable want of knowledge would be prejudicial. And, in a ſimilar caſe, it hath been determined, that, if the debtors of* TITIUS, *whoſe ſteward has been manumitted, ſhould, without knowledge of the manumiſſion, pay this freed-man what was due to* TITIUS, *they would be cleared from their debt, and the payment would be good; altho, by the rigor of the law, it would be otherwiſe; ſince they had made their payment to another than him, to whom it ought to have been made.*

De

De renunciatione.

§ XI. Mandatum non ſuſcipere cuilibet liberum eſt: ſuſceptum autem conſummandum eſt, aut quam primum renuntiandum, ut per ſemetipſum, aut per alium, eandem rem mandator exequatur. Nam, niſi ita renuntietur, ut integra cauſa mandatori reſervetur eandem rem explicandi, nihilominus mandati actio locum habet; niſi juſta cauſa interceſſerit aut non renuntiandi, aut intempeſtive renuntiandi.

§ 11. *Every man is at liberty to refuſe a mandate; but, if it is once accepted, it muſt be performed, or renounced, as ſoon as poſſible, that the mandator may tranſact the buſineſs himſelf, or by another. But, if the renunciation is made ſo late, that the mandator can have no opportunity of tranſacting this buſineſs properly, an action will lie againſt the mandatary, unleſs he can ſhew ſome juſt cauſe for his delay in not making a timely renunciation.*

De die et conditione.

§ XII. Mandatum et in diem differri et ſub conditione fieri poteſt.

§ 12. *A mandate may be contracted to tranſact a particular buſineſs at a diſtant day, or upon condition.*

De mercede.

§ XIII. In ſumma ſciendum eſt, mandatum, niſi gratuitum ſit, in aliam formam negotii cadere: nam, mercede conſtituta, incipit locatio et conductio eſſe. Et, (ut generaliter dicamus,) quibus caſibus, ſine mercede ſuſcepto officio, mandati ſive depoſiti contrahitur negotium, iis caſibus interveniente mercede locatio et conductio intelligitur contrahi. Et ideo, ſi fulloni polienda curandave quis dederit veſtimenta, aut ſarcinatori ſarcienda, nulla mercede conſtituta, neque promiſſa, mandati competit actio.

§ 13. *In fine it muſt be obſerved, that, if a mandate is not gratuitous, it then becomes another ſpecies of contract: for, if a price is agreed upon, the contract of* location *and* conduction *commences. And in general, when a truſt or buſineſs is undertaken without hire, the contract regards either a* mandate, *or a* depoſit; *but, when there is an agreement for hire, it conſtitutes* location *and* conduction. *And therefore, if a man gives his cloaths to a fuller, that they may be cleaned, or to a taylor, that they may be mended, and there is no agreement or promiſe made, an action of* mandate *will lie.*

TITULUS VIGESIMUS-OCTAVUS.

De obligationibus, quæ quaſi ex contractu naſcuntur.

Continuatio.

POST genera contractuum enumerata, diſpiciamus etiam de iis obligationibus, quæ quidem non proprie naſci ex contractu intelliguntur: ſed tamen, quia non ex maleficio ſubſtantiam capiunt, quaſi ex contractu naſci videntur.

Having already enumerated the various kinds of direct obligations, we will now treat of thoſe, which can not be ſaid properly to ariſe from a contract, but yet, inaſmuch as they take not their origin from any thing criminal, ſeem to ariſe from an implied, or a quaſi *contract.*

De negotiorum geſtione.

§ I. Igitur, cum quis negotia abſentis geſſerit, ultro citroque inter eos naſcuntur actiones, quæ appellantur negotiorum geſtorum. Sed domino quidem rei geſtæ adverſus eum, qui geſſit, directa competit actio; negotiorum autem geſtori contraria: quas ex nullo contractu proprie naſci manifeſtum eſt: quippe ita naſcuntur iſtæ actiones, ſi ſine mandato quiſque alienis negotiis gerendis ſe obtulerit, ex qua cauſa ii, quorum negotia geſta fuerint, etiam ignorantes obligantur. Idque utilitatis cauſa receptum eſt, ne abſentium, qui ſubita feſtinatione coacti, nulli demandata negotiorum ſuorum adminiſtratione, peregre profecti eſſent, deſererentur negotia: quæ ſane nemo curaturus eſſet, ſi de eo, quod quis impendiſſet, nullam habiturus eſſet actionem. Sicut autem is, qui utiliter geſſit negotia, dominum habet obligatum negotiorum geſtorum, ita et contra iſte quoque tenetur, ut adminiſtrationis reddat rationem: quo caſu ad exactiſſimam quiſque diligentiam compellitur reddere rationem: nec ſufficit talem diligentiam adhibere, qualem ſuis rebus adhibere ſolet: ſi modo alius, diligentior eo, commodius adminiſtraturus eſſet negotia.

§ 1. *When one perſon tranſacts the buſineſs of another, who is abſent, they reciprocally obtain a right to certain actions, called* actiones negotiorum geſtorum; *i. e. actions on account of buſineſs done: and it is manifeſt, that theſe can ariſe from no proper or regular contract; for they take place only, when one man aſſumes the care of the affairs of another without a* mandate: *and, in this caſe, thoſe perſons, for whom buſineſs is tranſacted, are always bound without their knowledge; and this is permitted for the public good, becauſe the buſineſs of thoſe, who are abſent in a foreign country, and have not committed the adminiſtration of their affairs to any particular perſon, would otherwiſe be totally neglected: for no man would take this*

care

care upon himſelf, if he could not afterwards bring an action to recover what he had expended. But, as the principal is bound to reimburſe the agent, who has negotiated his affairs properly, ſo is the agent bound to render a juſt account of his adminiſtration to his principal. And an agent, in this caſe, is obliged to uſe the moſt exact diligence; for it will not ſuffice, altho' he proves, that he has taken the ſame care of the affairs of his principal, which he uſually took of his own, if it can by any means appear, that a more diligent man could have acted with greater advantage to his principal.

De Tutela.

§ II. Tutores quoque, qui tutelæ judicio tenentur, non proprie ex contractu obligati eſſe intelliguntur: nullum enim negotium inter tutorem et pupillum contrahitur. Sed, quia ſane non ex maleficio tenentur, quaſi ex contractu teneri videntur. Hoc autem caſu mutuæ ſunt actiones. Non tantum enim pupillus cum tutore habet tutelæ actionem; ſed et contra tutor cum pupillo habet contrariam tutelæ, ſi vel impenderit aliquid in rem pupilli, vel pro eo fuerit obligatus, aut rem ſuam creditoribus ejus obligaverit.

§ 2. *A* tutor, *altho' he is ſubject to an action of* tutelage, *is not reckoned to be bound by any pact, or agreement; for between a tutor and his pupil there is no expreſs contract. But, altho' tutors are not ſubject to an action of male-feaſance, they are underſtood to be bound by an implied, or* quaſi-*contract; and thus both tutor and pupil may bring actions reciprocally; the pupil may bring a direct action of tutelage againſt his tutor, and the tutor, if he has expended his own money in the affairs of his pupil, or has been bound for him, or has mortgaged his own poſſeſſions to the creditors, is intituled to the action called* contraria tutelæ.

De rei communione.

§ III. Item, ſi inter aliquos communis res ſit ſine ſocietate; veluti quod pariter eis legata donatave eſſet, et alter eorum alteri ideo teneatur communi dividundo judicio, quod ſolus fructus ex ea re perceperit, aut quod ſocius ejus ſolus in eam rem neceſſarias impenſas fecerit: non intelligitur ex contractu proprie obligatus eſſe, quippe nihil inter ſe contraxerunt: ſed, quia ex maleficio non tenetur, quaſi ex contractu teneri videtur.

§ 3. *When a thing happens to be in common among perſons, who have never entered into a voluntary partenerſhip; as when the ſame field, or part of an inheritance, is deviſed, or given generally, between two; in this caſe the one may be called to anſwer the other by the action* communi dividundo, *either becauſe the one hath taken to his uſe the whole produce of the ground; or becauſe the other hath been at the ſole expence of maintaining it in good order. But neither of theſe perſons can properly be ſaid to be bound by contract; ſince they made no agreement between themſelves; but, inaſmuch as they are exempt from any criminal action, they are accounted as bound by a* quaſi-*contract.*

De hæreditatis communione.

§ IV. Idem juris eſt de eo, qui cohæredi familiæ erciſcundæ judicio ex his cauſis obligatus eſt.

§ 4. *And the ſame law prevails in regard to him, who for the ſame cauſes is bound to his co-heir and is liable to the action* familiæ erciſcundæ, *for the partition of an univerſal inheritance.*

De aditione hæreditatis.

§ V. Hæres quoque legatorum nomine non proprie ex contractu obligatus intelligitur, (neque enim cum hærede, neque cum defuncto ullum negotium legatarius geſſiſſe proprie dici poteſt,) et tamen, quia ex maleficio non eſt obligatus, quaſi ex contractu debere intelligitur.

§ 5. *An* heir *for the ſame reaſon cannot properly be ſaid to be bound by contract to a* legatary ; *for the* legatary *can never be ſuppoſed to have entered into any compact either with the heir, or with the deceaſed. But, as the heir cannot be proſecuted by an action of* male-feaſance, *he is preſumed to be indebted to the legatary by a* quaſi *contract.*

De ſolutione indebiti.

§ VI. Item is, cui quis per errorem non debitum ſolvit, quaſi ex contractu debere videtur : adeo enim non intelligitur proprie ex contractu obligatus eſſe ; ut, ſi certiorem rationem ſequamur, magis, (ut ſupra diximus,) ex diſtractu quam ex contractu poſſit dici obligatus eſſe. Nam, qui ſolvendi animo pecuniam dat, in hoc dare videtur, ut diſtrahat potius negotium, quam contrahat. Sed tamen perinde is, qui accipit, obligatur, ac ſi mutuum ei daretur; et ideo condictione tenetur.

§ 6. *He, to whom another has paid by miſtake what was not due, appears to be indebted by* quaſi *contract ; for he is certainly not bound by an expreſs agreement : and, ſtrictly ſpeaking, he might rather be ſaid, (as we have before obſerved,) to be bound by the diſſolution than by the making of a contract : for he, who paid the money with an intent to diſcharge his debts, ſeemed rather inclined to diſſolve an ingagement, than to contract one. But nevertheleſs, whoever receives money by the miſtake of another, is as much bound to repay it, as if it had been lent to him ; and he is therefore liable to an action of condiction.*

Quibus ex cauſis debitum ſolutum non repetitur.

§ VII. Ex quibuſdam tamen cauſis repeti non poteſt, quod per errorem non debitum ſolutum ſit; ſic namque definierunt veteres, ex quibus cauſis inficiando lis creſcit, ex iis cauſis non debitum ſolutum repeti non poſſe : veluti ex lege Aquilia, item ex legato : quod veteres quidem in iis legatis locum habere voluerunt, quæ certa conſtituta per damnationem cuique fuerant : noſtra autem conſtitutio, cum unam naturam omnibus legatis et fideicommiſſis indulſit, hujuſmodi augmentum

in

in omnibus legatis et fideicommiſſis extendi voluit: ſed non omnibus legatariis hoc præbuit, ſed tantummodo in iis legatis et fideicommiſſis, quæ ſacroſanctis Eccleſiis, et cæteris venerabilibus locis, quæ vel religionis vel pietatis intuitu honorantur, relicta ſunt; quæ, ſi indebita ſolvantur, non repetuntur.

§ 7. *In ſome caſes money paid by miſtake, when not due, cannot afterwards be demanded: for the antient lawyers have delivered it as a maxim, that where an action for double the value of the debt is given upon the denial of it, (as by the law Aquilia, and in the caſe of legacies) the debtor, who has thro error paid money to him, to whom it was not due, ſhall never recover it. But theſe lawyers would have this rule to take place only in regard to fixed and certain legacies, deviſed* per damnationem. *But our imperial conſtitution, which reduced all legacies and truſts to one common nature, hath cauſed this augmentation in* duplum *after denial to be extended to legacies and truſts in general: yet the privilege of not refunding what is paid by miſtake is by our conſtitution only granted to churches and other holy places, which are honored on account of religion and piety.*

Ex quibuſdam cauſis.] " Cujus rei ratio per- " obſcura eſt; nec habeo, quod reſpondeam, " niſi quod veriſimile eſt, certis in cauſis re- " ceptum fuiſſe, ut interrogati in jure, ſi nega- " rent, et mendacii convincerentur, in duplum " irent: unde poſtea inductum, ut, qui, ex his " cauſis conventus, ſolviſſet quantumvis in- " debitum, non repeteret; quaſi ſimplum " ideo ſolverit, ne inficiando periculum du- " pli ſubiret, et ita, quaſi tranſigendo, hoc peri- " culum a ſe amovere voluerit. Oportet vero " aliquam cauſam ſubeſſe; verbi gratia, dam- " num eſſe datum, licet forte non ab eo, qui " convenitur, ſed ab alio; legatum aliquod ad " pios uſus relictum eſſe, licet forte minus ſo- " lemniter. Nam, ſi nullum damnum datum " ſit, aut nihil relictum, puto, locum eſſe repe- " titioni. Excipiuntur et aliæ cauſæ ex quibus " indebitum per errorem ſolutum non repetitur, " ut cauſa dotis et tranſactionis." *Vinn.*

Ex lege Aquilia.] *vid. ff. 9. t. 2. l. 9. p. 10.*

Noſtra autem conſtitutio.] *C. 6. t. 43. l. 2. Comm. de legat.* " qua conſtitutione legatis om- " nibus et fideicommiſſis eadem natura attributa " eſt. Illa autem conſtitutio, qua jus, de quo hic " agitur, ad legata et fideicommiſſa, religionis " aut pietatis cauſa relicta, coarctavit impera- " tor, non extat. *Vinn.*

TITULUS VIGESIMUS-NONUS.

Per quas perſonas obligatio acquiritur.

C. iv. T. 27.

De his, qui ſunt in poteſtate.

EXPOSITIS generibus obligationum, quæ ex contractu vel quaſi ex contractu naſcuntur, admonendi ſumus, acquiri nobis non ſolum per noſmetipſos, ſed per eas quoque perſonas, quæ in noſtra poteſtate ſunt, veluti per ſervos et filios noſtros: ut tamen, quod per ſervos noſtros nobis acquiritur, totum noſtrum fiat: quod autem per liberos, quos in poteſtate habemus, ex obligatione fuerit acquiſitum, hoc dividatur ſecundum imaginem rerum, proprietatis, et uſusfructus, quam noſtra decrevit conſtitutio: ut, quod ab actione commodum perveniat, hujus uſumfructum

tum quidem habeat pater, proprietas autem filio ſervetur, ſcilicet patre actionem movente, ſecundum novellæ noſtræ conſtitutionis diviſionem.

Having explained the various kinds of obligation, which ariſe from contracts or quaſi-*contracts, we muſt now obſerve, that we acquire obligations not only by means of ourſelves, but alſo by thoſe, who are under our power; as by our ſlaves, and our children: and whatever is acquired by our ſlaves is wholly our own; but that, which is acquired by our children, under our power, by virtue of their contracts, muſt be divided according to the decree of our conſtitution, which gives to the father the uſufruct of the thing gained, but reſerves the property of it to the ſon. But a father, in bringing an action, muſt act in obedience to our novel conſtitution.*

Quam noſtra decrevit conſtitutio.] *vide Cod.* 6. *t.* 61. *l.* 6. *cum oportet, &c.*
Novellæ conſtitutionis.] *Cod.* 6. *t.* 61. *l.* 8.

De bona fide poſſeſſis.

§ 1. Item per liberos homines et alienos ſervos, quos bona fide poſſidemus, acquiritur nobis: ſed tantum ex duabus cauſis, id eſt, ſi quid ex operis ſuis, vel ex re noſtra, acquirant.

§ 1. *We may alſo acquire things by means of freemen, and the ſlaves of others, whom we poſſeſs* bona fide. *But this we can only do in two caſes; to wit, when they have gained an acquiſition by their labor, or by virtue of ſomething, which belongs to us.*

De ſervo fructuario, vel uſuario.

§ II. Per eum quoque ſervum, in quo uſumfructum vel uſum habemus, ſimiliter ex duabus iſtis cauſis nobis acquiritur.

§ 2. *We may alſo acquire in either of the above named caſes, by means even of thoſe ſlaves, of whom we have only the uſufruct or uſe.*

De ſervo communi.

§ III. Communem ſervum pro dominica parte dominis acquirere certum eſt, excepto eo, quod nominatim uni ſtipulando, aut per traditionem accipiendo, illi ſoli acquirit; veluti cum ita ſtipulatur, *Titio domino meo dare ſpondes?* Sed, ſi domini unius juſſu ſervus fuerit ſtipulatus, licet antea dubitabatur, tamen poſt noſtram deciſionem res expedita eſt, ut illi tantum acquirat, qui hoc ei facere juſſit, ut ſupra dictum eſt.

§ 3. *It is certain, that a ſlave, who is in common between two or more, acquires for his maſters, in proportion to the property, which each of them has in him; unleſs he ſtipulates, or receives ſomething, in the name of one of them only; as if he had thus ſtipulated;* do you promiſe to give ſuch a particular thing to TITIUS, *my maſter? for altho' it was a doubt in times paſt, whether a ſlave, when commanded, could ſtipulate for the ſole benefit of one of his maſters; yet, ſince our deciſion, it has become a ſettled point, (as we have ſaid before,) that a ſlave, in this caſe, can acquire for him only, who hath ordered the ſtipulation.*

Poſt noſtram deciſionem.] *Cod.* 4. *t.* 27. *l.* 3. *ſi duo, &c.*

TITU-

TITULUS TRIGESIMUS.

Quibus modis tollitur obligatio.

D. iv. T. 2, 3, 4. C. viii. T. 42, 43, 44.

De ſolutione.

TOLLITUR autem omnis obligatio ſolutione ejus, quod debetur: vel ſi quis conſentiente creditore aliud pro alio ſolverit. Nec intereſt, quis ſolvat, utrum ipſe, qui debet, an alius pro eo: liberatur enim et alio ſolvente, ſive ſciente, ſive ignorante debitore, vel invito eo ſolutio fiat. Item, ſi reus ſolverit, etiam ii, qui pro eo intervenerunt, liberantur. Idem ex contrario contingit, ſi fide-juſſor ſolverit: non enim ipſe ſolus liberatur, ſed etiam reus.

An obligation is diſſolved by the payment of what is due; or by the payment of one thing for another, if the creditor conſents: neither is it material, by whom payment is made, whether by the debtor himſelf, or by another for him; for a debtor becomes free from his debt, when another has paid it, either with or without his knowlege, or even againſt his conſent. Alſo when a principal debtor pays his creditors, then thoſe, who have been bound for him, are freed from their obligation: and, on the contrary, when a fide-juſſor *or bondſman clears himſelf from his obligation by payment, he not only becomes free himſelf, but the principal debtor is alſo cleared from his debt.*

De acceptilatione.

§ I. Item per acceptilationem tollitur obligatio: eſt autem acceptilatio imaginaria ſolutio. Quod enim ex verborum obligatione Titio debetur, id, ſi velit Titius remittere, poterit ſic fieri, ut patiatur hæc verba debitorem dicere: *quod ego tibi promiſi, habeſne acceptum?* et Titius reſpondeat, *habeo.* Sed et Græce poteſt acceptilatio fieri; dummodo ſic fiat, ut Latinis verbis ſolet: εχεις λαβων δηναρια τοσα; εχω λαβων. Quo genere, (ut diximus,) tantum eæ ſolvuntur obligationes, quæ ex verbis conſiſtunt, non etiam cæteræ. Conſentaneum enim viſum eſt, verbis factam obligationem aliis poſſe verbis diſſolvi. Sed et id, quod alia ex cauſa debetur, poteſt in ſtipulationem deduci, et per acceptilationem diſſolvi. Sicut etiam quod debetur pro parte recte ſolvitur; ita in parte debiti acceptilatio fieri poteſt.

§ 1. *An obligation is alſo diſſolved by* acceptilation; *which is an imaginary payment: for, if* TITIUS *is willing to remit what is due to him by a verbal contract, it may be done, if the debtor ſays;* do you regard what I promiſed you, as accepted and received? *and* TITIUS *anſwers,* I do. *An* acceptilation *may alſo be made in Greek, if it is ſo worded, as to agree with the Latin form;* εχεις λαβων δηναρια τοσα; εχω λαβων. *But the obligations, which are thus diſſolved, are verbal contracts, and no other: and it ſeems to be a juſt conſequence, that an obliga-*

tion, made by words only, may be diſſolved by other words of a contrary import. But it is obſervable, that any ſpecies of contract may be deduced to a ſtipulation, and of courſe may be diſſolved by acceptilation. *And note, that as a debt may be paid in part by money, ſo may it be paid in part alſo by* acceptilation.

De Aquiliana ſtipulatione et acceptilatione.

§ II. Eſt autem prodita ſtipulatio, quæ vulgo Aquiliana appellatur, per quam contingit, ut omnium rerum obligatio in ſtipulatum deducatur, et ea per acceptilationem tollatur. Stipulatio enim Aquiliana renovat omnes obligationes, et a Gallo Aquilio ita compoſita eſt; *quicquid te mihi ex quacunque cauſa dare facere oportet oportebitve, præſens in diemve, aut ſub conditione; quarumcunque rerum mihi tecum actio eſt, quæque adverſus te petitio, vel adverſus te perſecutio, eſt eritve; quodve tu meum habes, tenes, poſſides, dolove malo feciſti, quo minus poſſideas; quanti quæque earum rerum res erit, tantam pecuniam dari ſtipulatus eſt Aulus Agerius, ſpoſpondit Numerius Nigidius. Quod Numerius Nigidius Aulo Agerio ſpoſpondit, id haberetne a ſe acceptum Numerius Nigidius Aulum Agerium rogavit: Aulus Agerius Numerio Nigidio acceptum fecit.*

§ 2. *There is another ſpecies of ſtipulation, called commonly the* Aquilian *ſtipulation, by virtue of which every other kind of obligation may be reduced to a ſtipulation, and may afterwards be diſſolved by* acceptilation. *For the* Aquilian *ſtipulation changes all obligations, and was conſtituted by* GALLUS AQUILIUS *in the following manner*; do you promiſe, ſaid AULUS AGERIUS to NUMERIUS NIGIDIUS, to pay me a ſum of money, in lieu of what you was, or ſhall be, obliged to give me or to perform for my benefit, either ſimply, at a day to come, or upon condition; and in lieu of thoſe things, which, being my property, you HAVE, DETAIN, or POSSESS; or of which you have fraudulently quitted the poſſeſſion; and for which I may, or ſhall be, intituled to any ſpecies of action, plaint, or proſecution? NUMERIUS NIGIDIUS *anſwered* I do: *and, when this was ſaid,* NUMERIUS NIGIDIUS aſked AULUS AGERIUS, if he regarded the money as accepted and received, which he (NUMERIUS) had promiſed? *to which* AULUS AGERIUS *anſwered,* that he did regard it as accepted and received.

De novatione.

§ III. Præterea novatione tollitur obligatio; veluti ſi id, quod tibi Seius debebat, a Titio ſtipulatus ſis. Nam interventu novæ perſonæ nova naſcitur obligatio, et prima tollitur, tranſlata in poſteriorem: adeo ut interdum, licet poſterior ſtipulatio inutilis ſit, tamen prima novationis jure tollatur: veluti ſi id, quod tu Titio debes, a pupillo ſine tutoris auctoritate ſtipulatus fuerit; quo caſu res amittitur: nam et prior debitor liberatur, et poſterior obligatio nulla eſt. Non idem juris eſt, ſi a ſervo quis fuerit ſtipulatus: nam tunc prior perinde obligatus manet, ac ſi poſtea nullus ſtipulatus fuiſſet. Sed, ſi eadem perſona ſit, a qua poſtea ſtipuleris, ita demum novatio fit, ſi quid in poſteriore ſtipulatione novi ſit, forte ſi conditio

ditio aut dies aut fide-juſſor adjiciatur aut detrahatur. Quod autem diximus, ſi conditio adjiciatur, novationem fieri, ſic intelligi oportet, ut ita dicamus factam novationem, ſi conditio extiterit: alioqui, ſi defecerit, durat prior obligatio. Sed, cum hoc quidem inter veteres conſtabat, tunc fieri novationem, cum novandi animo in ſecundam obligationem itum fuerat, per hoc autem dubium erat, quando novandi animo videtur hoc fieri, et quaſdam de hoc præſumptiones alii in aliis caſibus introducebant, ideo noſtra proceſſit conſtitutio, quæ apertiſſime definivit, tunc ſolum novationem prioris obligationis fieri, quoties hoc ipſum inter contrahentes expreſſum fuerit, quod propter novationem prioris obligationis convenerunt: alioqui et manere priſtinam obligationem, et ſecundam ei accedere, ut maneat ex utraque cauſa obligatio, ſecundum noſtræ conſtitutionis definitionem, quam licet ex ipſius lectione apertius cognoſcere.

§ 3. *An obligation is alſo diſſolved by* novation: *as when you ſtipulate with* TITIUS *to receive from him what is due to you from* SEIUS. *For, by the intervention of a new debtor, a freſh obligation ariſes, by which the prior obligation is diſcharged, and transfered to the latter. And ſometimes, altho the latter ſtipulation is of no force, yet the prior contract is diſcharged by the mere act of* novation: *as if* TITIUS *ſhould ſtipulate to receive a debt, which I owe him, from a pupil without the authority of his tutor; for in this caſe the debt is loſt, becauſe the firſt debtor is freed from his debt, and the ſecond obligation is null: but it is not the ſame, if a man ſtipulates from a ſlave, with a deſign to make a* novation; *for then the firſt debtor remains bound, as if there had been no ſecond ſtipulation. And, if you ſtipulate from the ſame perſon a ſecond time, a* novation *ariſes, if any thing new is covenanted in the latter ſtipulation; as when a condition, a day, or a bondſman is added, or taken away. But note, that, when a condition only is added,* novation *does not take place, till the event happens; and, till then, the prior obligation continues. It was obſerved as a rule among the antient lawyers, that a* novation *aroſe, when a ſecond contract was entered into with an intent to diſſolve the former; but it was always a matter of great difficulty to know with what intent the ſecond obligation was made; and the judges, having no poſitive proof before them, were forced to form their opinions upon preſumptions, and according to the circumſtances of every particular caſe. This incertainty of judging gave riſe to our conſtitution, which enacts, that a* novation *of a former contract ſhall only take place, when it is expreſſed by the contractors, that they covenanted with an intent to make a* novation; *and that, when this is not expreſſed, the prior contract ſhall continue valid; and the ſecond be regarded as an acceſſion to it: ſo that an obligation ſhall remain by virtue of both contracts, according to the determination of our before named conſtitution, which may be better known by peruſal.*

Noſtra proceſſit conſtitutio.] *vid. Cod.* 8. *t.* 42. *l.* 8. *De novationibus.*

De contrario conſenſu.

§ IV. Hoc amplius, eæ obligationes, quæ conſenſu contrahuntur, contraria voluntate diſſolvuntur. Nam, ſi Titius et Seius inter ſe conſenſerint, ut fundum Tuſculanum emptum Seius haberet centum aureis; deinde, re nondum ſecuta, (id eſt, neque pretio ſoluto, neque fundo tradito,) placuerit

cuerit inter eos, ut diſcederetur ab ea emptione et venditione, invicem liberantur. Idem eſt in conductione et locatione, et in omnibus contractibus, qui ex conſenſu deſcendunt, ſicut jam dictum eſt.

§ 4. *We muſt obſerve farther, that thoſe obligations, which are contracted by conſent, may be diſſolved by diſſent. For, if* TITIUS *and* SEIUS *have agreed by compact between themſelves, that* SEIUS *ſhall have a certain eſtate for an hundred* aurei, *and afterwards before execution, that is, before the price is paid, or livery is made of the lands, if the parties diſſent from their agreement, they are mutually diſcharged from it. And the ſame may be ſaid of* location *and* conduction, *and of all other contracts, which ariſe from conſent.*

FINIS LIBRI TERTII.

DIVI

DIVI JUSTINIANI INSTITUTIONUM LIBER QUARTUS.

TITULUS PRIMUS.

De obligationibus, quæ ex delicto naſcuntur.

D. xlvii. T. 2. C. vi. T. 2.

Continuatio et diviſio obligationum ex delicto.

CUM ſit expoſitum ſuperiore libro de obligationibus ex contractu & quaſi ex contractu, ſequitur, ut de obligationibus ex maleficio & quaſi ex maleficio diſpiciamus. Sed illæ quidem, ut ſuo loco tradidimus, in quatuor genera dividuntur: hæ vero unius generis ſunt: nam omnes ex re naſcuntur, id eſt, ex ipſo maleficio, veluti ex furto, rapina, damno, injuria.

Having explained in the preceding book the nature of obligations, which ariſe from contracts and quaſi-*contracts, it follows, that we ſhould here treat of thoſe, which ariſe from male-feazance and* quaſi-*male-feazance. The former, as we have ſhewed in the proper place, are divided into four ſpecies; but the latter are of one kind only; for they all ariſe* ex re, *that is, from the crime or male-feazance itſelf; as from theft, rapin, damage, injury.*

Definitio furti.

§ I. Furtum eſt contrectatio fraudulosa, lucri faciendi gratia, vel ipſius rei, vel etiam uſus ejus, poſſeſſioniſve: quod lege naturali prohibitum eſt admittere.

§ 1. *Theft is a fraudulent ſubſtraction of the thing itſelf, the uſe of it, or the poſſeſſion, for the ſake of gain. And this is prohibited by the law of nature.*

Poſſeſſionis.] In *England* theft is commited of the poſſeſſion, when goods are ſtolen from a carrier, or a pledge from a creditor; and, if even the owner of ſuch goods or pledge ſhould take them away fraudulently, he would be guilty of larciny in regard to the poſſeſſion; for though the property is in him, yet the right of poſſeſſion is veſted in another. 3 *Co. inſt.* 110.

Etymologia.

§ II. Furtum autem vel à furvo, id eſt, nigro, dictum eſt, quod clam & obſcure fiat, vel plerumque nocte: vel à fraude: vel à ferendo, id eſt, auferendo: vel à Græco ſermone, qui φωρας appellant fures. Imo & Græci, ἀπο τȣ φερειν, φωρας dixerint.

§ 2. *The word* furtum [*theft*] *is derived from* furvum [*black or dark*] *becauſe theft is committed privately, and generally in the night:* ——*or from* fraus [*fraud*]: ——*or from* ferendo, *which is of the ſame import with* auferendo, *and denotes a ſubſtraction, or taking away. Or perhaps* furtum *is derived from the* Greek; *for the* Greeks *call* fures, φωρας; *and* φωρας *is derived from* φερειν, *which ſignifies* to take away.

Diviſio.

§ III. Furtorum autem duo ſunt genera; manifeſtum et nec manifeſtum. Nam conceptum & oblatum ſpecies potius actionis ſunt furto cohærentes, quam genera furtorum, ſicut inferius apparebit. Manifeſtus fur eſt, quem Græci ἐπ' ἀυτοφωρῳ appellant: nec ſolum is, qui in ipſo furto deprehenditur, ſed etiam is, qui eo loco deprehenditur, quo furtum fit: veluti qui in domo furtum fecit, &, nondum egreſſus januam, deprehenſus fuerit: & qui in oliveto olivarum, aut in vineto uvarum, furtum fecit, quamdiu in eo oliveto aut vineto deprehenſus fuerit. Imo ulterius furtum manifeſtum eſt extendendum, quamdiu eam rem fur tenens viſus vel deprehenſus fuerit, ſive in publico, ſive in privato, vel à domino, vel ab alio, antequam eo pervenerit, quo deferre vel deponere deſtinaſſet. Sed, ſi pertulit, quo deſtinavit, tametſi deprehendatur cum re furtiva, non eſt manifeſtus fur. Nec manifeſtum furtum quid ſit, ex iis, quæ diximus, intelligitur: nam quod manifeſtum non eſt, id ſcilicet nec manifeſtum eſt.

§ 3. *Of theft there are two ſpecies,* manifeſt *and not* manifeſt: *for the thefts, called* conceptum *and* oblatum, *rather denote the ſpecies of action ariſing on account of theft, than the ſpecies of theft; as will appear in the next paragraph. A manifeſt thief, whom the* Greeks *call* ἐπ' ἀυτοφωρῳ, *is he, who is taken in the act of thieving, or in the place, where he commited it: as if a man, having commited a theft within an houſe, ſhould be apprehended before he had paſſed through the outward gate of it: or, having ſtolen grapes or olives, ſhould be taken in the vineyard or olive orchard. Manifeſt theft is alſo farther extended: for, if the thief is apprehended, whileſt he is ſeen to have poſſeſſion of the things ſtolen, or if he is taken in public or in private, by the owner or by a ſtranger, at any time before his arrival at the place, to which he propoſed to carry it, he is guilty of a manifeſt theft. But if he actually arrives, before apprehenſion, at the place propoſed, then, altho' the thing ſtolen is found upon him, he is yet not reputed in law to be a manifeſt thief. By this deſcription, which we have given of* manifeſt *theft, it may be clearly underſtood what is meant by theft* not manifeſt.

De

De furto concepto, oblato, prohibito, non exhibito.

§ IV. Conceptum furtum dicitur, cum apud aliquem teſtibus præſentibus furtiva res quæſita, et inventa ſit: nam in eum propria actio conſtituta eſt, quamvis fur non ſit; quæ appellatur concepti. Oblatum furtum dicitur, cum res furtiva ab aliquo tibi oblata ſit, eaque apud te concepta ſit; utique ſi ea mente tibi data fuerit, ut apud te potius, quam apud eum, qui dedit, conciperetur. Nam tibi, apud quem concepta ſit, propria adverſus eum, qui obtulit, quamvis fur non ſit, conſtituta eſt actio, quæ appellatur oblati. Eſt etiam prohibiti furti actio adverſus eum, qui furtum quærere teſtibus præſentibus volentem prohibuerit. Præterea pœna conſtituitur edicto prætoris per actionem furti non exhibiti adverſus eum, qui furtivam rem apud ſe quæſitam & inventam non exhibuit. Sed hæ actiones, ſcilicet concepti, & oblati, & furti prohibiti, nec non furti non exhibiti, in deſuetudinem abierunt. Cum enim requiſitio rei furtivæ hodie ſecundum veterem obſervationem non fiat, merito ex conſequentia etiam præfatæ actiones ab uſu communi receſſerunt: cum manifeſtum ſit, quod omnes, qui ſcientes rem furtivam ſuſceperint, & celaverint, furti nec manifeſti obnoxii ſunt.

§ 4. *A theft is called* conceptum [i. e. *found*] *when a thing ſtolen is ſearched for and found in the poſſeſſion of ſome perſon in the preſence of witneſſes*; *and a particular action, called* actio concepti, *lies againſt ſuch poſſeſſor, altho' he did not commit the theft. A theft is called* oblatum [i. e. *offered*] *when a thing ſtolen is offered for inſtance to* Titius, *and found upon him, it having been given to him by* Seius, *to the intent that it might rather be found upon* Titius *than upon himſelf: and in this caſe a ſpecial action, called* actio oblati, *may be brought by* Titius *againſt* Seius, *altho'* Seius *was not guilty of the theft. There is alſo an action, called* prohibiti furti, *which lies againſt him, who hinders another to inquire of theft in the preſence of witneſſes. And farther, a penalty was conſtituted, by the edict of the prætor, to be ſued by the action* furti non exhibiti *againſt any man for not having exhibited things ſtolen, which upon a ſearch were found to have been in his poſſeſſion. But theſe four actions are become quite obſolete; for, ſince a ſearch after things ſtolen is not now made according to the antient formalities, theſe actions have of conſequence ceaſed to be in uſe: for it is a ſettled point, that all, who knowingly have received and concealed a thing ſtolen, are ſubject to the penalty of theft* not manifeſt.

Requiſitio rei furtivæ.] This inquiry after things ſtolen was made *lance & licio*, and is at leaſt as antient as the law of the twelve tables, in which it is mentioned. See *Au. Gell. noct. att. lib.* 11. *cap.* 18. But the commentators are not at all agreed in their very ideas of the *lanx* and *licium*, much leſs in the reaſons they aſſign for doing them. *Ex* Feſto *autem diſcimus*, [ſcis *Lanx*.] *lance & licio apud antiquos dici, quod qui furtum aut quærere in domo aliena,* *licio cinctus intrabat, lancemque ante oculos tenebat propter matrum-familiarum et virginum præſentiam. Marcilius vero putat, lancem oculis oppoſitiſſe Licio cinctum, ne agnoſceretur. Hæc ſanctæ eſſe videntur ab inſtitutis Athenienſium: nam Plato*, lib. 12. de legibus, *ſic ſcribit*, "*Si quis furtum apud quempiam velit quærere, is id faciat nudus,* "*aut licium habens et diſcinctus.*"

Nudi enim ædes ſuſpectas ingrediebantur amicti tantum ſimplici cincticulo, quod hic vetus Lictor

vocant, ne quid forte veſtibus conditum inferrent, dominoque ædium falſum crimen objectare poſſent.

Hanc autem furti inveſtigandi rationem, jam ſuo tempore ſublatam fuiſſe, refert Gellius; *ut veriſimile eſt, in locum ejus ſucceſſiſſe, quod hic ſcribit* Juſtinianus, *ut, teſtibus adhibitis, furtum in domo aliena quæreretur; quod tamen et ipſum, ut durum atque inhumanum, quoniam hoc modo ſecreta cujuſque hominum nimiæ curioſitati panduntur, poſtea exoleverit.* Vinn.

Qui ſcientes rem furtivam.] Before the 3d. and 4th. of *W.* and *M.* the receiving of ſtolen goods was only a treſpaſs or miſdemeanor by the law of *England*, and the receivers were puniſhable by fine and impriſonment, and not as acceſſaries. But by the 3d. and 4th. of *W.* and *M. cap* 9. "Receivers of ſtolen goods, know-" ing them to be ſtolen, are to be deemed ac-" ceſſaries after the fact, and to ſuffer as ſuch." But becauſe theſe receivers often concealed the principal felons, and thus eſcaped puniſhment as acceſſaries, inaſmuch as an acceſſary cannot be convicted, 'till after the conviction of the principal, it was therefore enacted, by 1 *Ann. cap.* 9. "That whoever ſhall buy, or receive, " ſtolen goods, knowing them to be ſtolen, " may be proſecuted for a miſdemeanor, and " puniſhed by fine and impriſonment, altho' " the principal felon be not convicted."

And by 5 *Ann. cap.* 31. "if any Perſon " ſhall receive or buy knowingly any ſtolen " goods, or knowingly harbour or conceal any " felon, he ſhall be taken as acceſſary to the " felon, and ſuffer as a felon." —— But, becauſe it was difficult to prove the receipt of ſtolen goods, the confederates of thieves frequently diſpoſing of them to the owners for a reward, it is provided by 4 *Geo.* 1. *cap.* 11. "that who-" ever ſhall take a reward under the pretenſe of " helping any one to ſtolen goods, ſhall ſuffer, " as if he himſelf had ſtolen them, unleſs he " cauſe the thief to be apprehended and brought " to trial, and give evidence againſt him."

Upon this clauſe the famous *Jonathan Wild* was convicted and executed, 10 *G.* 1. *Hiſt. pl. cor.* 620.

Pœna.

§ V. Pœna manifeſti furti quadrupli eſt, tam ex ſervi, quam ex liberi perſona: nec manifeſti, dupli.

§ 5. *The penalty of commiting a manifeſt theft is quadruple, whether the thief is free or bond: and the penalty of commiting a theft* not manifeſt *is double the value of the thing ſtolen.*

Pœna manifeſti.] The puniſhment of manifeſt theft was not always the ſame among the *Romans*; for, at different times, it hath been a pecuniary mulct, whipping, the loſs of eyes, the cutting off the offending member, and even death. The emperor *Juſtinian* indeed abſolutely forbad, that any member ſhould be cut off, or limb diſlocated on account of theft, ordering only a pecuniary mulct, or baniſhment, to be the puniſhment of thoſe, who were guilty of it. *vid. nov.* 134. *cap.* 13. *de pœnarum moderatione.*

But ſucceeding emperors ordered ſeverer puniſhments, *viz.* for the firſt offenſe, whipping; for the ſecond, ſtigmatizing on the back; or cutting off a member; and, for the third, hanging; yet theſe puniſhments were often varied, and ſometimes a theft was wholly forgiven, if it had been committed, through abſolute neceſſity. But, altho' a criminal ſhould undergo a corporal puniſhment, as whipping; yet by the *Roman* law the perſon injured might, notwithſtanding this, maintain a civil action againſt the offender for reſtitution.

Theft or larciny is, by the law of *England*, divided into ſimple and mixed larciny. Simple larciny is divided into grand and petit. Grand larciny is commited, when the thing ſtolen is above the value of twelve pence; petit larciny is committed, when the thing ſtolen is of the value of twelve pence only, or under. The nature of the offenſe is the ſame in both, but the puniſhment of the firſt is death and loſs of goods, and the puniſhment of the latter is loſs of goods and whipping, but not death. But in grand larciny the jury may find the goods ſtolen of leſs value than twelve pence, and ſo convict the priſoner of petty larciny only. *Hetley* 66. And this is often done.

Mixed larciny, or robbery, is a violent taking away of money or goods from the perſon of a man, putting him in fear, be the value of the thing taken above or under the value of one ſhilling: the puniſhment is death and forfeiture of all his eſtate. A felonious entering into a man's houſe in the night time, with an intent to commit felony, as to ſteal ſomething, whether ſuch intention is executed or not, is termed burglary; from the *Saxon* word *burgh*, a houſe, and *laron*, a theft.

And if ſuch offenſe is commited in the day-time it is called houſe-breaking. *vid.* 3. *Co. inſt.* 64. and *Hale's hiſt. of the pl. of the crown.* In regard to caſes of neceſſity, ſome authors, and particularly *Grotius de jure*, *tom.* 1. *de furt. et rap.*

rap. reſt. p. 473. and *Grotius de jur. bell. & pac. lib.* 2. *cap.* 2. write, that in caſes of extreme neceſſity, either of hunger or cloathing, the civil diſtributions of property ceaſe, and that by a kind of tacit condition the firſt community doth return, and upon this thoſe common aſſertions are grounded; *Quicquid neceſſitas cogit, defendit* ——— *neceſſitas eſt lex temporis et loci* ——— *in caſu extremæ neceſſitatis omnia ſunt communia.* And therefore it follows, that, in theſe caſes, theft is no theft, or at leaſt not puniſhable as ſuch; and even ſome of our own lawyers have aſſerted the ſame. *Brit. cap.* 10. *Plowd.* 18.*b.* 19.*a.* But it is the opinion of Sir *Matthew Hale*, that, where perſons live under the ſame civil government, it is a bold and dangerous aſſertion to ſay, that neceſſity can excuſe theft, at leaſt by the laws of *England*; and therefore, if a perſon being under neceſſity for want of ſuſtenance, or cloathes, ſhall clandeſtinely, and *animo furandi*, ſteal another man's goods, it is felony, and a crime by the laws of *England* puniſhable with death: altho' the judge, before whom the trial is, in this caſe [as in other caſes of extremity] is by the law of *England* intruſted with a power to reprieve the offender, before or after judgment, in order to the obtaining the king's mercy. *Hales's hiſt. P. C. vol.* 1. *p.* 54.

As to the reſtitution of ſtolen goods there are three ways of obtaining it; *viz.* By appeal of robbery or larciny. —— By the Statute of 21 *Hen.* VIII. *cap.* 11. —— And by the courſe of common law.

Upon an appeal, if the party appealed againſt was convicted, a reſtitution of the goods contained in the appeal was of courſe made to the appellant; and hence it is, that goods, omited in an appeal, are regarded as forfeited to the king.

But the Statute of 21 *Hen.* VIII. *cap.* 11. introduced a new law for the reſtitution of ſtolen goods, — ordaining, "that, if any perſon do "rob or take away the goods of any of the "king's ſubjects within the realm, and be in-"dicted, and found guilty by the evidence of "the party ſo robbed, or owner of the goods, "or by the evidence of any other by their "procurement, then the party robbed ſhall "be reſtored to his money, or goods, and the "juſtices, before whom the felon is found "guilty, ſhall have power to award writs of "reſtitution in like manner, as tho' the felon "was attainted at the ſuit of the party in an "appeal."

For before this ſtatute there was no reſtitution upon an indictment, but only upon an appeal.

Reſtitution by courſe of law, is either by taking the goods ſtolen, or by action. As to retaking them; if A ſteals the goods of B, and B takes his goods again, with intent to favor the thief, this is puniſhable by fine and impriſonment; but, if he takes them without ſuch intent, the taking is juſtifiable.

The party robbed may alſo proceed by action for the recovery of his money or goods, if he hath proſecuted the law againſt the offender. —— For example, if A ſteals the goods of B, *viz.* 50 *l.* in money, and is convicted, and hath his clergy upon the proſecution of B; and B afterwards brings a trover and converſion for this 50 *l.* and, upon not guilty pleaded, the ſpecial matter is found, reſtitution will be adjudged to the plaintiff, who hath already done his duty in proſecuting the law againſt the robber, ſo that the commonwealth can receive no injury; but it hath been held, that if a man felonioufly ſteals goods, and, before proſecution by indictment, the party robbed brings an action of trover, it will not lie; for by ſuch a practice felonies might be compounded. *Hale's hiſt. of the pleas of the crown, p.* 546.

Quomodo furtum fit; de contrectatione.

§ VI. Furtum autem fit, non ſolum cum quis intercipiendi cauſa rem alienam amovet: ſed generaliter, cum quis alienam rem, invito domino, contrectat. Itaque ſive creditor pignore, ſive is, apud quem res depoſita eſt, ea re utatur; ſive is, qui rem utendam accepit, in alium uſum eam transferat, quam cujus gratia ei data eſt, furtum committit: veluti, ſi quis argentum utendum acceperit, quaſi amicos ad cœnam invitaturus, & id peregre ſecum tulerit: aut ſi quis equum, geſtandi cauſa commodatum ſibi, longius aliquo duxerit: quod veteres ſcripſerunt de eo, qui in aciem equum perduxiſſet.

§ 6. *Theft is commited not only, when one man takes the property of another for the ſake of appropriating it to himſelf, but alſo in a more general ſenſe, when one man*

man uſes the property of another againſt the will of the proprietor: thus, if a creditor makes uſe of a pledge, or a depoſitory of the depoſit left with him, or if a man, who hath only the uſe of a thing for a ſpecial purpoſe, converts it to other uſes, a theft is commited. And if any one borrows plate under pretence of uſing it, at an entertainment of his friends, and then carries it with him into a foreign country;—— or if a man borrows an horſe, and rides it farther than he ought; theft is alſo committed: and the antients have held this to be law, in regard to him, who rides a borrowed horſe into a field of battle.

Furtum autem fit.] The law of *England*, where theft is more ſeverely puniſhed than it was formerly at *Rome*, is more ſparing than the civil law in ranking certain offenſes under the appellation of theft; for with us the malefeazances, mentioned in the text, are not reckoned thefts, and the perſons guilty of them are only liable to a civil action.

De affectu furandi.

§ VII. Placuit tamen, eos, qui rebus commodatis aliter uterentur, quam utendas acceperint, ita furtum committere, ſi ſe intelligant id, invito domino, facere; eumque, ſi intellexiſſet, non permiſſurum: at ſi permiſſurum credant, extra crimen videri, optima ſane diſtinctione; quia furtum ſine affectu furandi non committitur.

§ 7. *But it hath nevertheleſs been adjudged, that whoever applies a thing borrowed to other uſes than thoſe, for which he borrowed it, is not guilty of theft, unleſs the borrower knew, that he ſo applied it, contrary to the will of the owner, who would not have permited ſuch application, if he had been apprized of it. But it has alſo been held, that the borrower in this caſe is not guilty of theft, if it appears, that he thought, that the owner would have given his conſent. And this is a good diſtinction; for a theft can never be commited, unleſs there appears to have been a deſign and intention of ſtealing.*

De voluntate domini.

§ VIII. Sed et, ſi credat aliquis, invito domino, ſe rem commodatam ſibi contrectare, domino autem volente id fiat, dicitur furtum non fieri. Unde illud quæſitum eſt, cum Titius ſervum Mævii ſolicitaverit, ut quaſdam res domino ſurriperet, et ad eum perferret, et ſervus id ad dominum pertulerit: Mævius autem, dum vult Titium in ipſo delicto deprehendere, permiſerit ſervo quaſdam res ad eum perferre; utrum furti, an ſervi corrupti, judicio teneatur Titius, an neutro? Et cum nobis ſuper hac dubitatione ſuggeſtum eſt, et antiquorum prudentium ſuper hoc altercationes perſpeximus, quibuſdam neque furti, neque ſervi corrupti, actionem præſtantibus, quibuſdam furti tantummodo: nos, hujuſmodi calliditati obviam euntes, per noſtram conſtitutionem ſancimus, non ſolum furti actionem, ſed et ſervi corrupti contra eum dari. Licet enim is ſervus deterior à ſolicitatore minime factus eſt, et ideo non concurrant regulæ, quæ ſervi corrupti actionem introducunt; tamen conſilium corruptoris ad perniciem probitatis ſervi introductum eſt, ut ſit ei penalis actio impoſita, tanquam ſi re ipſa fuiſſet ſervus corruptus: ne

ex

ex hujuſmodi impunitate et in alium ſervum, qui facile poſſit corrumpi, tale facinus à quibuſdam perpetretur.

§ 8. *But, if a man imagines, that he uſes a thing borrowed in ſome manner contrary to the intention and will of the proprietor, when in reality the proprietor conſents, that it ſhould be ſo uſed, theft is not commited: and from hence ariſes a queſtion upon the following caſe:* Titius *ſolicited the ſlave of* Mævius *to rob his maſter, and to bring him the things ſtolen; of this the ſlave informed his maſter, who, being willing to diſcover* Titius *in the fact, permitted the ſlave to carry certain things to* Titius, *as ſtolen; will* Titius, *in this caſe, be ſubject to an action of theft, or to an action for having corrupted a ſlave, or to neither? When this was propoſed to us as a matter of doubt, and we perceived the altercations, which had formerly ſubſiſted among the antient lawyers upon the ſame point, ſome of them allowing of neither of the before-named actions, and others allowing an action of theft only, we therefore, being willing to obviate all ſubtilities, decreed by our conſtitution, that not only an action of theft might be brought, but alſo the action* ſervi corrupti, *which lies for having corrupted a ſlave. For altho' the ſlave became not the worſe for the ſolicitation, and therefore the cauſes, which introduce the action* ſervi corrupti, *do not concur; yet inaſmuch as ſuch ſolicitation was intended to corrupt, it hath therefore pleaſed us, that a penal action ſhall lie againſt the party ſoliciting, in the ſame manner as if he had actually ſucceeded by corrupting the ſlave: and this we have ordained, leſt impunity might incourage any evil-diſpoſed perſons to make the ſame attempt upon other ſlaves, who have leſs ſtrength of mind, and may be more eaſily corrupted.*

Per noſtram conſtitutionem.] *v. Cod.* 6. *t.* 2. *l.* 20.

Quarum rerum furtum fit. De liberis hominibus.

§ IX. Interdum etiam liberorum hominum furtum fit; veluti ſi quis liberorum noſtrorum, qui in poteſtate noſtra ſunt, ſubreptus fuerit.

§ 9. *A theft may be committed even of free perſons; as, for inſtance, when children, who are under power, are ſurreptitiouſly taken from their parents.*

Liberorum hominum furtum fit.] This crime in *England* is called *Kidnapping*, which is ſtealing away a man, woman, or child; it is an offenſe at common law, and puniſhable by fine, pillory, *&c.* *Raym.* 474. *Wood's Inſt.* 426.

By the 11 and 12 *W.* 3. cap. 7. if the maſter of a merchant ſhip ſhall during his being abroad force any man on ſhore, and willfully leave him behind, ſuch maſter ſhall ſuffer three months impriſonment.

De re propria.

§ X. Aliquando etiam ſuæ rei furtum quis committit; veluti ſi debitor rem, quam creditori pignoris cauſa dedit, ſubtraxerit.

§ 10. *A man may alſo poſſibly commit a theft even of his own property; as when a debtor hath taken away any particular thing, which he had left in pledge with his creditor.*

Qui tenentur furti. De eo cujus ope, conſilio, furtum factum eſt.

§ XI. Interdum quoque furti tenetur, qui ipſe furtum non fecit: qualis eſt is, cujus ope & conſilio furtum factum eſt. In quo numero

eſt.

eſt, qui tibi nummos excuſſit, ut alius eos raperet; aut tibi obſtiterit, ut alius rem tuam exciperet; aut oves tuas, vel boves fugaverit, ut alius eas acciperet. Et hoc veteres ſcripſerunt de eo, qui panno rubro fugavit armentum. Sed, ſi quid eorum per laſciviam, & non data opera, ut furtum admitteretur, factum eſt, in factum actio dari debet. At ubi ope Mævii Titius furtum fecerit, ambo furti tenentur. Ope & conſilio ejus quoque furtum admitti videtur, qui ſcalas forte feneſtris ſupponit, aut ipſas feneſtras vel oſtium effringit, ut alius furtum faceret; quive ferramenta ad effringendum, aut ſcalas, ut feneſtris ſupponerentur, commodaverit, ſciens, cujus rei gratia commodaverit. Certe qui nullam opem ad furtum faciendum adhibuit, ſed tantum conſilium dedit, atque hortatus eſt ad furtum faciendum, non tenetur furti.

§ 11. *An action of theft will, in ſome caſes, lie againſt perſons, who did not actually commit the theft: it will lie, for example, againſt thoſe, by whoſe aid and advice the theft was commited; and whoever ſtrikes money out of your hand, to the intent that another may pick it up; or whoever ſo obſtructs you, as to give an opportunity to his accomplice to take your ſheep, oxen, or any part of your property, muſt be reckoned in the number of aiders and adviſers. The antient lawyers alſo included him in this number, who frightened away a herd from its paſture with a red cloth. But, if a man ſhould do any of theſe acts wantonly, and without an intention of commiting theft, then an action can lie only* in factum, i. e. *upon the caſe, or the fact done: but when* Titius *commits theft by the aid of* Mævius, *they are both ſubject to an action of theft. Theft ſeems to be commited both by aid and advice, when a man puts a ladder to a window, or breaks open a door or window, to the intent, that another may commit theft; or when one man lends another iron bars, or ladders, knowing the bad purpoſes, to which they are to be applied: but it is certain, that he, who hath afforded no actual aſſiſtence, but hath only given his council by adviſing the crime, is not liable to an action of theft.*

Non tenetur furti.] By the law of *England* a man, who only adviſes another to commit grand larciny, is an acceſſary before the fact; but, in petit larciny, there can be no acceſſary; for altho' petit larciny is felony, yet the ſmallneſs of the offenſe, inaſmuch as it is not capital, excludeth acceſſaries both before and after. *Hiſt. pl. cor. vol.* 1. 616.

De his qui ſunt in poteſtate. Et de ope ac conſilio extranei.

§ XII. Hi, qui in parentum vel dominorum poteſtate ſunt, ſi rem eis ſurripiunt, furtum quidem faciunt, & res in furtivam cauſam cadit, nec ob id ab ullo uſucapi poteſt, antequam in domini poteſtatem revertatur: ſed furti actio non naſcitur; quia nec ex ulla cauſa poteſt inter eos actio naſci. Si vero ope & conſilio alterius furtum factum fuerit, quia utique furtum committitur, convenienter ille furti tenetur: quia verum eſt, ope et conſilio ejus furtum factum eſſe.

§ 12. *When perſons under the power of parents or maſters take any thing ſurreptitiouſly from ſuch parents or maſters, a theft is committed, and the thing is looked upon as ſtolen, ſo that it cannot be preſcribed to by any one, until it hath firſt reverted into the power of the proprietor; and yet an action of theft will not lie; for between parents and their children, or maſters and ſlaves, no action can ariſe. But between*

if the fact was done by the aid and advice of any other, inaſmuch as a theft is commited, an action of theft will lie againſt the aider.

Sed furti actio non naſcitur.] No action was allowed in this caſe on account of the power, which parents and maſters had over their children and ſlaves by the *Roman* law; *ſervi & filii noſtri furtum quidem nobis faciunt, ipſi autem furti non tenentur: neque enim, qui poteſt in furem ſtatuere, neceſſe habet adverſus furem litigare; idcirco nec actio ei a veteribus prodita eſt.* ff. 47. t. 2. l. 17. Ulpian.

Quibus datur actio furti.

§ XIII. Furti autem actio ei competit, cujus intereſt rem ſalvam eſſe, licet dominus non ſit. Itaque nec domino aliter competit, quam ſi ejus interſit, rem non perire.

§ 13. *An action of theft may be brought by any man, who has an intereſt in the ſafety of the thing ſtolen, altho he is not the proprietor of it: and the proprietor himſelf can have no action, unleſs he has an intereſt.*

Cujus intereſt rem ſalvam.] By the law of *England* every perſon is deemed to have a ſufficient intereſt to proſecute another for the commiſſion of a public crime, ſuch as treaſon, robbery, theft, &c. by an indictment; which is defined to be a brief narrative of an offenſe, commited by any perſon, who ought to be puniſhed for the good of the public; and it is therefore ſaid to be a proſecution at the ſuit of the king; for which reaſon the party, who proſecutes, is always admited as a good witneſs to prove the fact.

And, tho' an indictment for theft ſhould be of the goods of an unknown perſon, it would yet be good; for otherwiſe, in many caſes, felons would eſcape unpuniſhed. *Hiſt. pl. cor.* 512. *Bacon's abridgment.* indictment.

De pignore ſurrepto creditori.

§ XIV. Unde conſtat creditorem de pignore ſurrepto furti actione agere poſſe, etiamſi idoneum debitorem habeat: quia expedit ei pignori potius incumbere, quam in perſonam agere: adeo quidem ut, quamvis ipſe debitor eam rem ſurripuerit, nihilominus creditori competat actio furti.

§ 14. *From hence it follows, that a creditor may bring an action of theft, on account of a pledge ſtolen, altho' his debtor is ſolvent; becauſe it may be more expedient for him to rely upon his pledge, than to bring an action againſt the perſon of his debtor; and, altho' the debtor himſelf ſhould have been the taker of the pledge, yet an action of theft will lie againſt him.*

De re fulloni, vel ſarcinatori, vel bonæ fidei emptori, ſurrepta.

§ XV. Item ſi fullo polienda curandave, aut ſarcinator ſarcienda, veſtimenta mercede certa conſtituta acceperit, eaque furto amiſerit, ipſe furti habet actionem, non dominus; quia domini nihil intereſt, eam rem non perire; cum judicio locati à fullone, aut ſarcinatore, rem ſuam perſequi poſſit. Sed et bonæ fidei emptori ſurreptare, quam emerit, quamvis dominus non ſit, omnino competit furti actio, quemadmodum & creditori. Fulloni vero & ſarcinatori non aliter furti actionem competere placuit, quam ſi ſolvendo fuerint, hoc eſt, ſi domino rei æſtimationem ſolvere poſſint. Nam ſi ſolvendo non ſint, tunc, quia ab eis ſuum conſequi non poſſit, ipſi domino furti competit

actio: quia hoc casu ipsius interest, rem salvam esse. Idem est, etsi in parte solvendo fuerit fullo aut sarcinator.

§ 15. *If a fuller receives cloaths to clean, and they are afterwards stolen from him, the fuller may bring an action of theft, but not the owner; for the owner is reputed to have no interest in their safety, because he has a right of action, called* locati, *against the fuller. But, if a thing is stolen from a* bona fide *purchaser, he is intituled, like a creditor, to an action of theft, altho' he is not the proprietor. But an action of theft is not maintainable by the fuller, or any tradesman in similar circumstances, unless he is solvent, that is, unless he is able to pay the owner the full value of the thing lost; for, if the fuller is insolvent, then the owner, who cannot recover from the fuller, is allowed to bring an action of theft, having in this case an interest. And note, that whoever is unable to pay the whole of what is due, such person is esteemed insolvent, let the deficiency be ever so small.*

De re commodata.

XVI. Quæ de fullone et sarcinatore diximus, eadem et ad eum, cui commodata res est, transferenda, veteres existimabant. Nam ut ille fullo, mercedem accipiendo, custodiam præstat, ita is quoque, qui commodatum utendi causa accepit, similiter necesse habet custodiam præstare. Sed nostra providentia etiam hoc in nostris decisionibus emendavit, ut in domini voluntate sit, sive commodati actionem adversus eum, qui rem commodatam accepit, movere desiderat, sive furti adversus eum, qui rem surripuit; et, alterutra earum electa, dominum non posse ex pœnitentia ad alteram venire actionem; sed, siquidem furem elegerit, illum, qui rem utendam accepit, penitus liberari: sin autem commodator veniat adversus eum, qui rem utendam accepit, ipsi quidem nullo modo competere posse adversus furem furti actionem: eum autem, qui pro re commodata convenitur, posse adversus furem furti habere actionem: ita tamen, si dominus, sciens rem esse surreptam, adversus eum, cui res commodata fuerit, pervenit. Sin autem nescius et dubitans, rem esse surreptam, apud eum commodati actionem instituerit: postea autem, re comperta, voluerit remittere quidem commodati actionem, ad furti autem actionem pervenire, tunc licentia ei concedatur et adversus furem venire, obstaculo nullo ei opponendo: quoniam incertus constitutus movit adversus eum, qui rem utendam accepit, commodati actionem; nisi domino ab eo satisfactum fuerit: tunc etenim omnino furem à domino quidem furti actione liberari; suppositum autem esse ei, qui pro re sibi commodata domino satisfecit: cum manifestissimum sit, etiamsi ab initio dominus actionem commodati instituerit, ignarus rem esse surreptam, postea autem, hoc ei cognito, adversus furem transierit, omnino liberari eum, qui rem commodatam acceperit, quemcunque causæ exitum dominus adversus furem habuerit: eadem definitione obtinente, sive in parte, sive in solidum solvendo sit is, qui rem commodatam acceperit.

§. 16.

§ 16. *The antients were of opinion, that what we have ſaid of a fuller is equally applicable to him, to whom ſomething is lent. For as the fuller, by agreeing for a certain price, is obliged to make good the cloathes commited to his cuſtody, ſo is he alſo, who receives a loan for the ſake of uſing it, under the like neceſſity of preſerving it. But we have amended the law in this point by our deciſions, ſo that it is now at the will of the owner either to bring an action of theft againſt the thief, or an action, on account of the thing lent, againſt the borrower. But, if the owner once makes an election of the one, he can never afterwards have recourſe to the other; and, if he chuſes to proſecute the thief, the borrower is altogether free from any action; and if the owner, or lender, brings a ſuit againſt the borrower, he can by no means bring an action againſt the thief. But the borrower, who is convened on account of the thing lent, may bring an action of theft againſt the thief, if the owner, who convened him, was apprized, that the thing was ſtolen; but if the owner, either not knowing or doubting of the theft, inſtitutes an action of loan againſt the borrower, and afterwards upon information is willing to withdraw it, and recur to an action of theft, he ſhall have liberty, in conſideration of his incertainty, to proſecute the thief without obſtacle, if the borrower has not ſatisfied his demand; but, if the borrower has given the owner ſatisfaction, then the thief is freed from any action of theft, which can be brought by the owner; but he is nevertheleſs ſubject to the proſecution of the borrower, who hath ſatisfied the owner. But it is moſt manifeſt, that, if the owner of any particular thing, not knowing, that it is ſtolen, ſhould at firſt inſtitute an action of loan againſt the borrower, but ſhould afterwards, upon better information, chuſe to perſue the thief by an action of theft, the borrower is ſecure, whatever may be the iſſue of the action brought againſt the thief. And this obtains as law, whether the borrower is able to anſwer the whole, or a part only, of the value of the thing.*

De re depoſita.

§ XVII. Sed is, apud quem res depoſita eſt, cuſtodiam non præſtat; ſed tantum in eo obnoxius eſt, ſi quid ipſe dolo malo fecerit: qua de cauſa, ſi res ei ſurrepta fuerit, quia reſtituendæ ejus rei, nomine depoſiti, non tenetur, nec ob id ejus intereſt rem ſalvam eſſe, furti agere non poteſt: ſed furti actio domino competit.

§ 17. *A depoſitary is not obliged to make good the thing depoſited, unleſs he is himſelf guilty of ſome fraud, or malefeazance: and therefore, as a depoſitary is not obliged to make reſtitution, when the depoſit is ſtolen, and as he has conſequently no intereſt in the conſervation of the depoſit, he is not allowed to bring an action of theft, which in this caſe can only be maintained by the owner.*

An impubes furti tenetur.

§ XVIII. In ſumma ſciendum eſt, quæſitum eſſe, an impubes rem alienam amovendo furtum faciat? Et placuit, quia furtum ex affectu furandi conſiſtit, ita demum obligari eo crimine impuberem, ſi proximus pubertati ſit, et ob id intelligat ſe delinquere.

§ 18. *It hath been a queſtion, whether a perſon within puberty, who hath taken away the property of another, can be guilty of theft? And it hath been determined, that, inaſmuch as theft conſiſts in the intention of defrauding, a perſon within puberty*

may be charged with theft, if he is near the age of puberty, and can be proved to have been ſenſible, that what he did was criminal.

Quæſitum eſt an impubes.] It is clear, that, in *England*, a minor above fourteen is ſubject to capital puniſhment, as well as perſons of full age; for it is a preſumption of law, that minors after fourteen are *doli capaces*, and able to diſcern between good and evil. But an infant, under fourteen, and above twelve, is not preſumed to be capable of fraud; yet, if it appears to the court, that he could diſcern between good and evil at the time of the offenſe committed, he may be convicted, and undergo judgement and execution of death, tho' he hath not completed his fourteenth year; but it is at the diſcretion of the judge to reprieve him before or after judgement, in order to obtain the king's pardon.

And farther, if an infant, even under twelve, and above ſeven, commits felony, tho' he is *prima facie* to be judged not guilty, becauſe he is ſuppoſed not ſenſible of the nature of the crime; yet, if in this caſe it ſhould appear by pregnant evidence and circumſtances, that he had diſcernment to judge between good and evil, judgement of death may be given againſt him. *Hiſt. pl. cor.* 26. 27. *vol.* 1.

Quid veniat in hanc actionem: et de affinibus actionibus.

§ XIX. Furti actio, ſive dupli, ſive quadrupli, tantum ad pœnæ perſecutionem pertinet. Nam ipſius rei perſecutionem extrinſecus habet dominus, quam aut vindicando aut condicendo poteſt auferre. Sed rei vindicatio quidem adverſus poſſeſſorem eſt, ſive fur ipſe poſſidet, ſive alius quilibet. Condictio autem adverſus furem ipſum, hæredemve ejus, licet non poſſideat, competit.

§ 19. *An action of theft can only be brought for the penalty, whether double or quadruple: for the owner of the thing ſtolen may recover the thing itſelf either by vindication or condiction. An action of vindication may be brought againſt him, who hath poſſeſſion, whether he is the thief or any other; but condiction is maintainable only againſt the thief himſelf, or his heir; yet it will lie againſt either of them, whether he is or is not in poſſeſſion of the thing ſtolen.*

TITULUS SECUNDUS.

De vi bonorum raptorum.

D. xlvii. T. 8. C. ix. T. 33.

Origo hujus actionis, et quid in eam veniat.

QUI vi res alienas rapit, tenetur quidem etiam furti; (quis enim magis alienam rem, invito domino, contrectat, quam qui vi rapit? ideoque recte dictum eſt, eum improbum furem eſſe;) ſed tamen propriam actionem ejus delicti nomine prætor introduxit, quæ appellatur *vi bonorum raptorum*; et eſt intra annum quadrupli, poſt annum ſimpli; quæ actio utilis eſt, etiamſi quis unam rem, licet minimam, rapuerit. Quadruplum autem non totum pœna eſt, ſicut in actione furti manifeſti

feſti diximus; ſed in quadruplo ineſt et rei perſecutio; ut pœna tripli ſit, ſive comprehendatur raptor in ipſo delicto, ſive non. Ridiculum enim eſſet, levioris conditionis eſſe eum, qui vi rapit, quam qui clam amovet.

He, who takes the property of another by force, is liable to an action of theft; [*for who can be ſaid to take the property of another more againſt his will, than he, who takes it by force? and it hath therefore been rightly obſerved, that ſuch a thief is one of the worſt kind:*] *but the prætor hath nevertheleſs introduced a peculiar action in this caſe, called* vi bonorum raptorum; *which, if brought within a year after the robbery, inforces the payment of the quadruple value of the thing taken; but, if it is brought after the expiration of a year, then the ſingle value only is claimable; and this action is of ſuch a nature, that it may be brought for any ſingle thing, tho' it was of the leaſt value imaginable, if it was taken by force. But the whole quadruple value is not exacted merely for the penalty, as in an action of* manifeſt theft; *for, in this quadruple value, the thing itſelf is included, ſo that, ſtrictly, the penalty is only threefold; but then it is inflicted without diſtinguiſhing whether the robber was, or was not taken in the actual commiſſion of the fact. For it would be ridiculous, that a robber, who uſes force, ſhould be in a better condition, than he, who is only guilty of a clandeſtine theft.*

Licet minimam rapuerit.] Robbery is defined, by the *Engliſh* lawyers, to be a felonious and violent taking of money or goods from the perſon of another, putting him in fear, let the value of the thing, or things taken, be what it will, above or under one ſhilling. *Hiſt. of the pleas of the crown*, p. 532.

Adverſus quos datur.

§ I. Ita tamen competit hæc actio, ſi dolo malo quis rapuerit: nam, qui aliquo errore ductus, rem ſuam eſſe exiſtimans, et imprudens juris, eo animo rapuerit, quaſi domino liceat etiam per vim rem ſuam auferre à poſſeſſoribus, abſolvi debet: cui ſcilicet conveniens eſt, nec furti teneri eum, qui eodem hoc animo rapuit. Sed, ne, dum talia excogitantur, inveniatur via, per quam raptores impunè ſuam exerceant avaritiam, melius divalibus conſtitutionibus pro hac parte proſpectum eſt, ut nemini liceat vi rapere vel rem mobilem, vel ſe moventem, licet ſuam eandem rem exiſtimet. Sed, ſi quis contra ſtatuta principum fecerit, rei quidem ſuæ dominio cadere: ſin autem aliena res ſit, poſt reſtitutionem ejus, etiam æſtimationem ejuſdem rei præſtare. Quod non ſolum in mobilibus rebus, quæ rapi poſſunt, conſtitutiones obtinere cenſuerunt, ſed etiam in invaſionibus, quæ circa res ſoli fiunt: ut, ex hac cauſa, ab omni rapina homines abſtineant.

§ 1. *The action* de vi bonorum raptorum *is only maintainable, when there is fraud uſed, as well as force: for, if a man, being ignorant of the law and erroneouſly thinking any particular thing to be his own, ſhould take it away by force from the poſſeſſor, upon a full perſuaſion, that he, as proprietor, could juſtify ſuch a proceeding, he ought to be acquited upon this action: neither is he ſubject, under the before-mentioned circumſtances, to an action of theft. But, leſt robbers ſhould from hence find out a way of practiſing their villanies with impunity, it is provided by the imperial conſtitu-*

tions,

tions, that no man ſhall be at liberty to take by force any moveable thing, or living creature, out of the poſſeſſion of another, altho' he believes it to be his own; and that, whoever offends, by forcibly ſeizing his property, ſhall forfeit it; and that, whoever takes the property of another, imagining it to be his own, ſhall be obliged not only to reſtore the thing itſelf, but alſo to pay the value of it as a penalty. And the emperors have thought proper, that this ſhould obtain, not only in regard to things moveable and moving, which may be carried away, but alſo in regard to invaſions, or forcible entries, made upon things immoveable, as lands or houſes, to the intent, that mankind may be detered from commiting any ſpecies of rapin.

Sit ab omni rapina.] *vid. ff. 4. t. 2. l. 13. cod. 8. t. 4. l. 7.* It ſeems, that, by the common law of *England*, a man diſſeiſed of lands or tenements, is permited to regain the poſſeſſion by force: but this indulgence having been found by experience to be prejudicial to the public peace, by giving an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbours, and to retain their wrongful poſſeſſions, it hath been thought neceſſary to reſtrain all perſons, by many ſevere acts of parliament, from the uſe of ſuch violent methods of doing themſelves juſtice. *See 5 Ric. 2. ſtat. 1. cap. 8. 15 Ric. 2. cap. 2. 8 Hen. 6. cap. 9. 31 Eliz. cap. 11. 21 Jac. 1. cap. 15. Hawk. pleas of the crown. b. 1. chap. 64.*

Quibus datur.

§ II. Sane in hac actione non utique expectatur rem in bonis actoris eſſe: nam, ſive in bonis ſit, ſive non, ſi tamen ex bonis ſit, locum hæc actio habebit. Quare ſive locata, ſive commodata, ſive etiam pignorata, ſive depoſita, ſit res apud Titium ſic, ut interſit ejus, eam rem per vim non auferri, (veluti ſi in depoſita re culpam quoque promiſit,) ſive bona fide poſſideat, ſive uſumfructum quis habeat in ea, vel quid aliud juris, ut interſit ejus non rapi, dicendum eſt, ei competere hanc actionem, non ut dominium accipiat, ſed illud ſolum, quod ex bonis ejus, qui rapinam paſſus eſt, id eſt, quod ex ſubſtantia ejus ablatum eſſe proponatur. Et generaliter dicendum eſt, ex quibus cauſis furti actio competit in re clam facta, ex iiſdem cauſis omnes hanc habere actionem.

§ 2. *In this action, it is not conſidered, whether the thing, taken by force, is, or is not, the property of the complainant; for, if he has an intereſt in it, the action is maintainable: and therefore, if a thing is let, lent, or pledged to* Titius, *or depoſited with him, ſo that he becomes intereſted in the preſervation of it, as he may be, even in the caſe of a depoſit, if he hath promiſed to be anſwerable for its ſafe cuſtody; or, if* Titius *was a* bona fide *poſſeſſor, or intituled to the uſufruct, or has any other right, which gives an intereſt, he may then bring this action, not for the recovery of the abſolute property, but of that only, to which his intereſt extends. And we may in general affirm, that the ſame cauſes, which intitule a man to inſtitute an action of theft, when any thing hath been privately ſtolen from him, will alſo intitule him to bring the action* vi bonorum raptorum, *when force has been uſed.*

TITULUS

TITULUS TERTIUS.

De lege Aquilia.

D. ix. T. 2. C. iii. T. 35.

Summa. Caput primum.

DAMNI injuriæ actio conſtituitur per legem Aquiliam; cujus primo capite cautum eſt, ut, ſi quis alienum hominem, alienamve quadrupedem, quæ pecudum numero ſit, injuria occiderit, quanti ea res in eo anno plurimi fuerit, tantum domino dare damnetur.

The action for injurious damage is given by the law Aquilia; *which enacts, in the firſt chapter, that, if any man injuriouſly kills the ſlave, or four-footed beaſt of another, which may be reckoned in the number of his cattle, he ſhall be condemned to pay the owner the greateſt price, which the ſlave or beaſt might have been ſold for, at any time within a year, computing backward from the day, when the wound was given.*

Damni injuria actio.] Almoſt all the ſuits, which may be inſtituted according to the civil law, under the law *Aquilia*, may be commenced in *England* by means of an action of treſpaſs upon the caſe. *Cowe. inſt. h. t.* The law *Aquilia* is ſuppoſed to have been *a plebiſcite*, made by *Aquilius*, tribune of the people, *ann. U. C.* 572. *vid. Hein. ſyntag. lib.* 4. *t.* 3.

Injuria occiderit.] It is enacted by 23 *Car.* 2. *cap.* 7. that, if any perſon ſhall malitiouſly maim or hurt any cattle, or deſtroy any plantation of trees, or throw down incloſures, he ſhall forfeit treble damages in an action of treſpaſs.

In eo anno.] ſee the ninth ſection of the third title of this book.

De quadrupede, quæ pecudum numero eſt.

§ I. Quod autem non præciſe de quadrupede, ſed de ea tantum, quæ pecudum numero eſt, cavetur, eo pertinet, ut neque de feris beſtiis, neque de canibus, cautum eſſe intelligamus; ſed de iis tantum, quæ gregatim proprie paſci dicuntur, quales ſunt equi, muli, aſini, oves, boves, capræ. De ſuibus quoque idem placuit. Nam et ſues quoque pecudum appellatione continentur: quia et hi gregatim paſcuntur. Sic denique et Homerus in Odyſſea ait; (ſicut Ælius Marcianus in ſuis inſtitutionibus refert.)

Δαὶς τοιγε συεσσι παρημθμον, οἱ δε νεμονται
Παρ Κοραχος πετρη, ἐπι τη κρηνη Ἀρεθουσῃ.

Hoc eſt,

Aſſidet is ſuibus, quorum grex magnus in agris
Paſcitur, ad Coracis ſaxum, fontemque Arethuſam.

§ 1. *As the law does not ſpeak of four-footed beaſts in general, but of thoſe only, which may be reckoned cattle, we may collect, that wild beaſts and dogs do not come within the intendment of the law, which can be underſtood to include only thoſe animals, which feed in herds; as horſes, mules, aſſes, ſheep, oxen, goats,* &c.——*It hath alſo been determined,*

determined, that ſwine are comprized under the term cattle, becauſe they feed in herds; and this Homer *teſtifies in the Odyſſy, for which he is quoted by* Ælius Marcian *in his inſtitutes:*— you will find him taking care of the ſwine, which feed in herds at the *Coraſian* rock, *&c. Odyſ. b.* 13.

Ut neque de feris beſtiis.] The law of *England* allows an action of treſpaſs to be brought on account of maſtiffs, ſpaniels, grayhounds; and alſo on account of ſome things wild by nature, if they are reclaimed by art and induſtry, as bears, foxes, ferrets, &c. or their whelps. *Hale's hiſt. pl. cor.* 5. 12. And, when beaſts, wild by nature, are fit for food, and reduced to tameneſs, it is agreed, that whoever takes any of theſe from the poſſeſſor commits theft; and it appears to be the better opinion, that it is felony to take wild pidgeons from a dove-houſe, or hares, or deer, in an houſe, or even a park, incloſed in ſuch a manner, that the owner may take them whenever he pleaſes, without any danger of their eſcaping; in which caſes, they are as much in his power as fiſh in a pond, or young pidgeons, or hawks in a neſt; in taking of which it is agreed, that felony may be commited. *Hawk. pl. of the cr. b.* 1. *ch.* 34.

De injuria.

§ II. Injuria autem occidere intelligitur, qui nullo jure occidit. Itaque, qui latronem inſidiatorem occidit, non tenetur: utique ſi aliter periculum effugere non poteſt.

§ 2. *A man, who kills another without having a right or authority ſo to do, is underſtood to kill him injuriouſly: but, when there is a right, there can be no puniſhment; and therefore he is not ſubject to the law, who kills a robber, or an aſſaſſin, if there was no other way of avoiding the danger threatened.*

Itaque qui latronem.] At common law, if a thief had aſſaulted a man, with an intention to rob him, and he had killed the aſſaulter, it had been *ſe defendendo*; but yet he would, according to ſome opinions, have forfeited his goods. 11 *Co. rep.* 82. *b.* tho' other books hold the contrary. 26 *Aſſiz.* 32.

But it is now provided by 24 *H.* 8. *c.* 10. " that, if any perſon is indicted, or appealed for " the death of any evil-diſpoſed perſons at- " tempting to murder, rob, or break manſion- " houſes, the perſon ſo indicted or appealed, " and by verdict ſo found, ſhall not forfeit any " lands or goods, but ſhall be thereof acquited, " in like manner as if he had been acquited of " the death of the ſaid evil-diſpoſed perſons."

But this ſtatute extends not to indemnify the killing a felon, when the felony is not accompanied with force; for it ſpeaks of robbery; therefore the killing a man, who only attempts to pick a pocket, is not within the act; becauſe there can, in ſuch a caſe, be no neceſſity to kill. *Hale's hiſt. of the pl. of the crown. vol.* 1. *p.* 488.

De caſu, dolo, et culpa.

§ III. Ac ne is quidem hac lege tenetur, qui caſu occidit, ſi modo culpa ejus nulla inveniatur. Nam alioqui non minus ex dolo, quam ex culpa, quiſque hac lege tenetur.

§ 3. *Neither is he ſubject to the* Aquilian *law, who hath killed another by accident; if no fault can be found in him. But the law does not puniſh a man leſs for damage, done by his fault or negligence, than for damage done by fraud or deſign.*

De jaculatione.

§ IV. Itaque, ſi quis, dum jaculis ludit vel exercitatur, tranſeuntem ſervum tuum trajecerit, diſtinguitur. Nam, ſi id à milite in eo campo, ubi ſolitum eſt exercitari, admiſſum eſt, nulla culpa ejus intelligitur; ſi alius tale quid admiſerit, culpæ reus eſt. Idem juris eſt de milite, ſi in

in alio loco, quam qui ad exercitandum militibus deſtinatus eſt, id admiſerit.

§ 4. *But, if a man, by throwing a javelin, for his diverſion or exerciſe, happens to kill a ſlave, who is paſſing, we muſt, in this caſe, make a diſtinction: for, if the ſlave is killed by a ſoldier, whileſt he is exerciſing in a place appointed for that purpoſe, the ſoldier is guilty of no fault; but if any other perſon ſhould accidentally kill a ſlave by throwing a javelin, he is guilty of a fault; and even, if a ſoldier ſhould kill a ſlave accidentally by throwing a javelin in any other place, than that appointed for ſoldiers to exerciſe in, he alſo is guilty of a fault.*

De putatione.

§ V. Item ſi putator, ex arbore ramo dejecto, ſervum tuum tranſeuntem occiderit, ſi prope viam publicam aut vicinalem id factum eſt, neque proclamavit, ut caſus evitari poſſet, culpæ reus eſt; ſed, ſi proclamavit, nec ille curavit præcavere, extra culpam eſt putator. Æque extra culpam eſſe intelligitur, ſi ſeorſum à via forte, vel in medio fundo cædebat, licet not proclamavit: quia in eo loco nulli extraneo jus fuerat verſandi.

§ 5. *If a man is lopping a tree, and happens to kill a ſlave, who is paſſing, the lopper is guilty of a fault, if he worked near a public road, or in a way leading to a village, without giving a proper warning by proclamation; but, if he made due proclamation, and the other did not take care of himſelf, the lopper is exempt from fault: and he is equally exempt from fault, altho' he did not make proclamation, if he worked apart from the high road, or in the middle of a field; for a ſtranger has no right of paſſage thro' ſuch places.*

De curatione relicta.

§ VI. Præterea, ſi medicus, qui ſervum tuum ſecuit, dereliquerit curationem ejus, et ob id mortuus fuerit ſervus, culpæ reus erit.

Alſo, if a phyſician, or chirurgeon, who has made an inciſion in the body of a ſlave, ſhould afterwards neglect or forſake the cure, by which the death of the ſlave is occaſioned, he is guilty of a fault.

De imperitia medici.

§ VII. Imperitia quoque culpæ adnumeratur; veluti ſi medicus ideo ſervum tuum occiderit, quia male eum ſecuerit, aut perperam ei medicamentum dederit.

§ 7. *The want of ſkill in a profeſſion is alſo regarded as a fault; thus a phyſician, for inſtance, is culpable, and of courſe ſubject to an action, who occaſions the death of a ſlave by an unſkillful inciſion, or a raſh adminiſtration of medicines.*

De imperitia et infirmitate mulionis, aut equo vecti.

§ VIII. Impetu quoque mularum, quas mulio propter imperitiam retinere non potuit, ſi ſervus tuus oppreſſus fuerit, culpæ reus eſt mulio.

lio. Sed et, ſi propter infirmitatem eas retinere non potuerit, cum alius firmior eas retinere potuiſſet, æque culpæ tenetur. Eadem placuerunt de eo quoque, qui cum equo veheretur, impetum ejus, aut propter infirmitatem, aut propter imperitiam ſuam, retinere non potuerit.

§ 8. *If a mule-driver, by reaſon of unſkilfulneſs, is unable to manage his mules, and a ſlave is run over by them, the mule-driver is in fault; and, if he wants ſtrength to rein them in, when another man is able to do it, he is then equally culpable: and the ſame may be ſaid of a rider, who, thro' want either of ſtrength or ſkill, is not able to manage his horſe.*

Quanti dammum æſtimetur, et de hæredibus.

§ IX. His autem verbis legis, *quanti id eo in anno plurimi fuerit*, illa ſententia exprimitur, ut ſi quis hominem tuum, qui hodie claudus, aut mancus, aut luſcus erit, occiderit, qui in eo anno integer aut pretioſus fuerit, non tanti teneatur, quanti hodie erit, ſed quanti in eo anno plurimi fuerit: qua ratione creditum eſt pœnalem eſſe hujus legis actionem; quia non ſolum tanti quiſque obligatur, quantum damni dederit, ſed aliquando longe pluris. Ideoque conſtat, in hæredem eam actionem non tranſire, quæ tranſitura fuiſſet, ſi ultra damnum nunquam lis æſtimaretur.

§ 9. *Theſe words of the law* Aquilia, let him, who kills a ſlave, or beaſt of another, forfeit the greateſt price, which either could have been ſold for in that year, *are to be underſtood in the following ſenſe; as thus, if* Titius *accidentally kills a ſlave, who was then lame, or wanted a limb, or an eye, but had been within the ſpace of a year perfect in all his parts, and very valuable, then* Titius *ſhall be obliged to pay, not what the ſlave was worth on the day, when he was killed, but what he was worth at any time within a year preceding his death, when he was in the fulleſt vigor. An action therefore, upon the law* Aquilia, *has always been regarded as penal; for it obliges a man to pay not only the full value of the damage done, but often much more than the full value; and of conſequence can by no means paſs againſt the heir of the offender: but it might legally have been transfered againſt the heir, if the condemnation had never exceeded the quantum of the damage.*

Quid æſtimatur.

§ X. Illud non ex verbis legis, ſed ex interpretatione, placuit, non ſolum perempti corporis æſtimationem habendam eſſe ſecundum ea, quæ diximus, ſed, eo amplius, quicquid præterea, perempto eo corpore, damni nobis illatum fuerit; veluti ſi ſervum tuum hæredem ab aliquo inſtitutum ante quis occiderit, quam is juſſu tuo hæreditatem adierit: nam hæreditatis quoque amiſſæ rationem eſſe habendam conſtat. Item, ſi ex pari mularum unam, vel ex quadrigis equorum unum, quis occiderit, vel ex comœdis unus ſervus occiſus fuerit, non ſolum occiſi fit æſtimatio,

æſtimatio, ſed eo amplius id quoque computatur, quanti depretiati ſunt, qui ſuperſunt.

§ 10. *It hath prevailed by conſtruction, tho' not by virtue of the expreſs words of the law, that not only the value of a ſlave is to be computed, as we have already mentioned; but that an eſtimation muſt be made of whatever farther damage is occaſioned by his death; as if* Titius, *for example, ſhould kill a ſlave at the time, when he was inſtituted an heir, and before he had actually entered upon the heirſhip at the command of his maſter; for, in this caſe, the loſs of the inheritance muſt be brought into the computation. Alſo if an horſe, or mule is killed, by which a pair, or ſet, is broken, or if a ſlave is ſlain, who made one of a company of comedians, an eſtimation muſt be made not only according to the value of that ſlave or animal, but according to the value of thoſe, which remain; for, if they are damaged, the diminution of their value is alſo taken into the account.*

De concurſu hujus actionis et capitalis.

§ XI. Liberum autem eſt ei, cujus ſervus occiſus fuerit, et ex judicio privato legis Aquiliæ damnum perſequi, et capitalis criminis eum reum facere.

§ 11. *The maſter of a ſlave, who is killed, is at liberty to ſue for damages by a private action, founded upon the law* Aquilia, *and at the ſame time to proſecute the offender publicly, for a capital crime.*

Liberum autem eſt ei.] It ſeems to be the better opinion, that a perſon in *England*, who is guilty of felony, and pardoned, or burned in the hand, may be proceeded againſt in a civil action at the ſuit of the party injured; for, when the offender hath been pardoned, or proſecuted, there can be no inconvenience in allowing the action, and the previous criminal proſecution ought to be no bar to it; for why ſhould not the criminal anſwer in damages to the party injured, as well as be made an example for the ſake of the public, whom he hath offended? *Bacon's abridgment, vol.* 1. *p.* 64.

But no action can be brought, whileſt the felon is under indictment for the crime; for, if that were allowed, it might hinder all exemplary puniſhment. *Style* 346.

Caput ſecundum.

§ XII. Caput ſecundum legis Aquiliæ in uſu non eſt.

§ 12. *The ſecond chapter of the law* Aquilia *is not in uſe.*

Caput tertium, quod damnum vindicatur.

§ XIII. Capite tertio de omni cætero damno cavetur; itaque, ſi quis ſervum, vel eam quadrupedem, quæ in pecudum numero eſt, vulneraverit, ſive eam quadrupedem, quæ in pecudum numero non eſt, veluti canem, aut feram beſtiam, vulneraverit aut occiderit, hoc capite actio conſtituitur. In cæteris quoque omnibus animalibus, item in omnibus rebus, quæ anima carent, damnum per injuriam datum hac parte vindicatur. Si quid enim uſtum, aut ruptum, aut fractum fuerit, actio ex hoc capite conſtituitur; quanquam poterat ſola rupti appellatio in omnes iſtas cauſas ſufficere: ruptum enim intelligitur, quod quoquo modo corruptum eſt; unde non ſolum fracta, aut uſta, ſed

etiam ſciſſa, et colliſa, et effuſa, et quoquo modo perempta atque deteriora facta, hoc verbo continentur. Denique reſponſum eſt, ſi quis in alienum vinum aut oleum id miſcuerit, quo naturalis bonitas vini aut olei corrumperetur, ex hac parte legis Aquiliæ eum teneri.

§ 13. *By the third chapter of this law, a remedy is given for every other kind of damage; and therefore, if a man wounds a ſlave, or four-footed animal, which is ranked among cattle, or which is not ranked among cattle, as a dog or wild beaſt, an action will lie againſt him by virtue of this third part of the law. A reparation may alſo be obtained, under this chapter, for all damage injuriouſly done to animals in general, or to things inanimate; and the ſame chapter appoints an action for the recovery of the value of whatever is burned, ſpoiled, or broken; but the term* ruptum *would alone be ſufficient in any of theſe caſes; for in whatever manner a thing is damaged, or corrupted, it is underſtood to be* ruptum, *or ſpoiled, in ſome degree; ſo that whenever a thing is broken, burned, or even torn, bruiſed, ſpilled, or in any manner made worſe, it may be ſaid to be* ruptum. *It hath alſo been determined, that, if a man intermixes any thing, with the wine or oil of another, ſo as to corrupt or impair it's natural goodneſs, he is liable to an action founded upon this chapter of the law* Aquilia.

De dolo et culpa.

§ XIV. Illud palam eſt, ſicut ex primo capite demum quiſque tenetur, ſi dolo aut culpa ejus homo aut quadrupes occiſus occiſave fuerit, ita ex hoc capite, de dolo aut culpa, et de cætero damno, quemque teneri: ex hoc tamen capite, non quanti in eo anno, ſed quanti in diebus triginta proximis res fuerit, obligatur is, qui damnum dederit.

§ 14. *It is evident, that the firſt part or chapter of the law ſubjects every man to an action, who kills the ſlave or beaſt of another, and that the third part gives a remedy for any other damage, occaſioned either by a fraud or a fault. But by this third chapter the perſon, who did the damage, is not obliged to pay the higheſt price, which the thing damaged might have been ſold for, at any time within the year, but only the value of it at any time within thirty days, previous to the damage.*

Quanti damnum æſtimetur.

§ XV. Ac nec *plurimi* quidem verbum adjicitur. Sed Sabino recte placuit, perinde habendam æſtimationem, ac ſi etiam hac parte *plurimi* verbum adjectum fuiſſet; nam plebem Romanam, quæ, Aquilio tribuno rogante, hanc legem tulit, contentam fuiſſe, quod prima parte eo verbo uſa eſſet.

§ 15. *But it is not ſaid in the third part of the law, that the* higheſt *value of the thing damaged ſhall be recovered by action. But, in the opinion of* Sabinus, *the valuation ought to be made, as if the word higheſt had not been omited; for, when* Aquilius, *the tribune, propoſed this law, the commonalty of* Rome *thought it ſufficient to inſert the word* higheſt *in the firſt chapter.*

De actione directa, utili, et in factum.

§ XVI. Cæterum placuit, ita demum directam ex hac lege actionem esse, si quis præcipue corpore suo damnum dederit. Ideoque in eum, qui alio modo damnum dederit, utiles actiones dari solent; veluti si quis hominem alienum, aut pecus, ita incluserit, ut fame necaretur: aut jumentum ita vehementer egerit, ut rumperetur: aut pecus in tantum exagitaverit, ut præcipitaretur: aut si quis alieno servo persuaserit, ut in arborem ascenderet, vel in puteum descenderet, et is ascendendo, vel descendendo, aut mortuus, aut aliqua parte corporis læsus fuerit; utilis actio in eum datur: sed, si quis alienum servum aut de ponte, aut de ripa, in flumen dejecerit, et is suffocatus fuerit, eo quod projecit, corpore suo damnum dedisse non difficulter intelligi potest: ideoque ipsa lege Aquilia tenetur. Sed, si non corpore damnum fuerit datum, neque corpus læsum fuerit, sed alio modo alicui damnum contigerit, cum non sufficiat neque directa, neque utilis legis Aquiliæ actio, placuit, eum, qui obnoxius fuerit, in factum actione teneri: veluti si quis misericordia ductus alienum servum compeditum solverit, ut fugeret.

§ 16. *It has been determined, that, if a man hath, with his own hand or body, done damage to another, a direct action will lie by virtue of this law. But when damage is done by any other means, as by imprisoning a slave, or impounding the cattle of another, till they die with hunger; by driving a beast of burden so vehemently as to spoil him; by chasing an herd of cattle, till they leap down a precipice; or by persuading a slave to climb a tree, or go down into a well, by which he is killed or maimed; then the action, called* utilis, *is given, by which reparation may be obtained. And note, that, if* Titius *thrusts the slave of another into the water from the top of a bridge or bank, and the slave is drowned, in consequence of the fall, it is plain that* Titius *occasioned this damage with his own hands, and he is therefore subject to a direct action. But if the damage received was not done by the hand or body of another, and is not corporal, so that neither a direct nor beneficial action can be brought by virtue of the* Aquilian *law, then in these circumstances an action upon the case, or fact, will lie against the causer of the damage: and therefore, if any man thro compassion should unchain the slave of another, and so promote his escape, a reparation may be obtained against him by an action upon the fact.*

Utiles actiones dari.] The actions, termed *utiles*, may, in general, be defined to be actions introduced by equity in all cases, where the strict law is deficient, and does not supply the necessary remedies.

Thus these beneficial, or equitable actions, called *utiles*, bear some similitude to those actions, which in *England* are called actions upon the case.

In factum actione.] It may be proper here to observe in general, that for every right, and every injury, done to a man in person, reputation, or property, the law of *England* allows a remedy; but this remedy must, in general, be taken according to the writs and settled actions prescribed by law; as debt upon contract, trespass on a manifest and open invasion, *&c.* but where the law has made no provision, or rather, where no general action could well be framed before-hand, the ways of injuring, and methods of deceiving, being so various, every person is allowed to bring a special action on his own case. *Bacon's abridg. vol.* 1. *p.* 44.

TITULUS

LIB. IV. TIT. IV.

TITULUS QUARTUS.

De Injuriis.

D. xlvii. T. 10. C. ix. T. 35. et 36.

Verbum injuria quot modis accipitur.

GEneraliter injuria dicitur omne, quod non jure fit: ſpecialiter, alias contumelia, quæ à contemnendo dicta eſt, quam Græci ὕβριν appellant: alias culpa, quam Græci ἀδίκημα dicunt, ſicut in lege Aquilia damnum injuria datum accipitur: alias iniquitas et injuſtitia, quam Græci ἀνομίαν & ἀδικίαν vocant: cum enim prætor vel judex non jure contra quem pronunciat, injuriam accepiſſe dicitur.

The Word Injuria *in a general ſenſe denotes every act, which is unjuſt: but, when ſpecially uſed, it is of the ſame import with* contumelia, *which takes it's derivation from* contemno, *and is in* greek *termed* ὕβρις: *ſometimes it ſignifies a fault, called by the* greeks ἀδίκημα, *in which acceptation it is uſed in the law* Aquilia, *when damage, injuriouſly given, is ſpoken of: at other times it ſignifies iniquity or injuſtice, which the* greeks *call* ἀνομίαν *and* ἀδικίαν: *thus, when the prætor or judge pronounces ſentence unjuſtly againſt any perſon, ſuch perſon is ſaid to have ſuffered an injury.*

Quibus modis injuria fit.

§ I. Injuria autem committitur, non ſolum cum quis pugno pulſatus, aut fuſtibus cæſus, vel etiam verberatus erit; ſed et ſi cui convitium factum fuerit; ſive cujus bona quaſi debitoris, qui nihil deberet, poſſeſſa fuerint ab eo, qui intelligebat, nihil eum ſibi debere: vel ſi quis ad infamiam alicujus libellum aut carmen (aut hiſtoriam) ſcripſerit, compoſuerit, ediderit, dolove malo fecerit, quo quid eorum fieret: ſive quis matremfamilias, aut prætextatum prætextatamve, adſectatus fuerit: ſive cujus pudicitia attentata eſſe dicetur: et denique, aliis plurimis modis admitti injuriam, manifeſtum eſt.

§ 1. *An injury may be done not only by beating and wounding, but alſo by convitious language, or by ſeizing the goods of a man, as if he were a debtor, when the perſon, who ſeized them, well knew, that nothing was due to him. It is alſo manifeſt, that an injury may be commited by writing a defamatory libel, poem, or hiſtory; or by malitiouſly cauſing another ſo to do; alſo by continually ſoliciting the chaſtity of a boy, girl, or woman of reputation; and by various other means, which are too numerous to be ſpecified.*

Libellum aut carmen.] A libel, according to the definitions given of it in the law of *England*, is a malitious defamation, expreſſed either in words or writing, or by ſigns, pictures, h &c. tending either to blacken the memory of e one, who is dead, or the reputation of one, who is living. 5 *Co. rep. de lib. illis famoſis, p.* 125.

By the *Roman* law the punithment of the author or publiſher of an infamous libel, if it co-fted a capital crime, was death. *Cod.* 9. *t.* 36.

But

But, if it brought no man's life into danger, and affected only reputation, the offender was rendered incapable of giving teſtimony, and of making a will. *ff.* 47. *t.* 10. *l.* 5. In *England* the puniſhment may be by fine, pillory, or whiping, when the offender is proceeded againſt by indictment, or information; but in a civil action the puniſhment founds only in coſts and damages. But as to mere words of defamation, they are at common law not actionable, except when they have been of real damage and injury to the perſon ſpoken againſt; for mere contumely is of but little conſideration; and the eccleſiaſtical courts may be prohibited by the temporal courts from proceeding in a cauſe of defamation, when the ſuit is not wholly of a ſpiritual nature: as for calling a man an heretic, ſchiſmatic, adulterer, fornicator, *&c.* 4 *Co. rep. p.* 20. *Palmer v. Iherſe.*

Qui et per quos injuriam patiuntur. De parente et liberis, viro et uxore, ſocero et nuru.

§ II. Patitur autem quis injuriam non ſolum per ſemetipſum, ſed etiam per liberos ſuos, quos in poteſtate habet; item per uxorem ſuam; id enim magis prævaluit. Itaque, ſi filiæ alicujus, quæ Titio nupta eſt, injuriam feceris, non ſolum filiæ nomine tecum injuriarum agi poteſt, ſed etiam patris quoque et mariti nomine. Contra autem, ſi viro injuria facta ſit, uxor injuriarum agere non poteſt. Defendi enim uxores à viris, non viros ab uxoribus, æquum eſt. Sed et ſocer nurus nomine, cujus vir in ejus poteſtate eſt, injuriarum agere poteſt.

§ 2. *A man may receive an injury not only in his own perſon, but in that of his children under his power, and alſo in the perſon of his wife; for this is now the more prevalent opinion; and therefore, if an injury is done to* Seius's *daughter, who is married to* Titius, *an action may be brought not only in the name of the daughter, but in the name either of her father or her husband; but, if the husband receives an injury, the wife is not allowed to inſtitute a ſuit in his defenſe; for it is a maxim, that wives may be defended by their huſbands, but not huſbands by their wives. And note, that a father-in-law may alſo commence a ſuit in the name of his ſon's wife, on account of an injury done to her, if her huſband is under the power of his father.*

De ſervo.

§ III. Servis autem ipſis quidem nulla injuria fieri intelligitur, ſed domino per eos fieri videtur: non tamen iiſdem modis, quibus etiam per liberos et uxores; ſed ita, cum quid atrocius commiſſum fuerit, et quod aperte ad contumeliam domini reſpicit; veluti ſi quis alienum ſervum atrociter verberaverit; et in hunc caſum actio proponitur. At, ſi quis ſervo convitium fecerit, vel pugno eum percuſſerit, nulla in eum actio domino competit.

§ 3. *An injury is never underſtood to be done to a ſlave; but is reputed to be done to the maſter, thro' the perſon of his ſlave: but what amounts to an injury in regard to a wife or child, does not amount to an injury, ſuffered thro' the perſon of a ſlave: and therefore to conſtitute an injury, by means of the perſon of a ſlave, ſome conſiderable damage muſt be done to him, and ſomething which openly affects his maſter; as if a ſtranger ſhould beat the ſlave of another in a cruel manner: for in this caſe an action would lie; but, if a man ſhould only give ill language to a ſlave, or ſtrike him with his fiſt, the maſter can bring no action upon that account.*

De

De ſervo communi.

§ IV. Si communi ſervo injuria facta ſit, æquum eſt, non pro ea parte, qua dominus quiſque eſt, æſtimationem injuriæ fieri, ſed ex dominorum perſona, quia ipſis fit injuria.

§ 4. *If an injury is done to the common ſlave of many maſters, the eſtimation of the injury received is not to be made according to their ſeveral proportions of property in the ſlave, but according to the quality of each maſter; for it is to them, to whom the injury is done.*

De ſervo fructuario.

§ V. Quod ſi uſusfructus in ſervo Titii eſt, proprietas Mævii, magis Mævio injuria fieri intelligitur.

§ 5. *If* Titius *has the uſufruct of a ſlave, and* Mævius *the property, then any injury, which is done to that ſlave, is underſtood to be done to* Mævius *the proprietor.*

De eo, qui bona fide ſervit.

§ VI. Sed, ſi libero homini, qui tibi bona fide ſervit, injuria facta ſit, nulla tibi actio dabitur, ſed ſuo nomine is experiri poterit, niſi in contumeliam tuam pulſatus ſit; tunc enim competit et tibi injuriarum actio. Idem ergo eſt et in ſervo alieno bona fide tibi ſerviente, ut toties admittatur injuriarum actio, quoties in tuam contumeliam injuria ei facta eſt.

§ 6. *But, if an injury is done to a free perſon, who is in the ſervice of* Titius, Titius *can bring no action of injury, but the ſervant muſt commence a ſuit in his own name, unleſs the perſon, who beat him, did it principally for the ſake of affronting his maſter; and, in this caſe,* Titius *may alſo bring an action of injury. The ſame law likewiſe obtains, if your ſervant is the ſlave of another; for as often as he receives an injury, which was intended to affront you, you may yourſelf bring an action of injury.*

Pœna injuriarum ex l. 12. *tabb. et ex jure prætorio.*

§ VII. Pœna autem injuriarum ex lege 12. tabularum propter membrum quidem ruptum talio erat: propter os vero fractum nummariæ pœnæ erant conſtitutæ, quaſi in magna veterum paupertate. Sed poſtea prætores permittebant ipſis, qui injuriam paſſi ſunt, eam æſtimare, ut judex vel tanti reum condemnet, quanti injuriam paſſus æſtimaverit, vel minoris, prout ei viſum fuerit. Sed pœna quidem injuriæ, quæ ex lege 12. tabularum introducta eſt, in deſuetudinem abiit: quam autem prætores introduxerunt, (quæ etiam honoraria appellatur,) in judiciis frequentatur. Nam, ſecundum gradum dignitatis vitæque honeſtatem, creſcit aut minuitur æſtimatio injuriæ. Qui gradus condemnationis

demnationis et in ſervili perſona non immerito ſervatur, ut aliud in ſervo actore, aliud in medii actus homine, aliud in viliſſimo vel compedito, jus æſtimationis conſtituatur.

§ 7. *The puniſhment of an injury, according to the* 12 *tables, was a return of the like injury, if any limb was broken; but, if a blow only was given, or a ſingle bone broken, then the puniſhment was pecuniary, which was not without effect among the antients, who lived in great poverty. The prætors afterwards permited the parties injured to fix their damages at a certain ſum, which might ſerve as a guide to the judge, but not preclude him from leſſening the eſtimate at his diſcretion. The ſpecies of pecuniary puniſhment, which was introduced by the law of the* 12 *tables, fell by degrees into deſuetude, and that, which the prætors gave riſe to, is now ſolely in uſe, and is termed honorary; for the eſtimation of an injury is either increaſed or diminiſhed according to the degree and quality of the perſon injured; and this diſtinction of degree is not improperly obſerved even in regard to ſlaves; ſo that the ſame injury may be variouſly eſtimated, according to the ſtate and condition of him, who ſuffered it; at an higher rate, if he had acted as ſteward or agent to his maſter, and at a lower eſtimation, if he was a ſlave of an inferior ſort.*

Pœna autem injuriarum.] *Aulus Gellius* is of opinion, that retaliation was never executed even among the antient *Romans*, unleſs the party offending conſented; for he aſſerts, that the offender was always at liberty to commute his puniſhment on paying a certain ſum of money in proportion to his circumſtances. *vid. Aul. Gell. lib.* 20. *cap.* 1. And it were to be wiſhed, for the honor of antient *Rome*, that this opinion was rightly founded; for the law of retaliation, altho' it has the appearance of great equity, is certainly full of abſurdity and injuſtice upon various accounts. And, to obviate any objection, which may be made from the law of *Moſes*, the beſt commentators upon the pentateuch have always looked upon ſuch expreſſions, *as an eye for an eye, and a tooth for a tooth*, to be only proverbial. *vid. Mr. Le Clerc on Exod.* 21. *v.* 24. *Deut.* 19. *v.* 21.

Sed poſtea prætores.] The law of the 12 tables, as given by *Gellius*, is in theſe words. *Si injuriam faxit alteri viginti quinque æris poenae ſunto.* To which he adds; *quis enim tam inops, quem ab injuriæ faciendæ lubidine viginti quinque aſſes deterreant? itaque cum ad eam legem Q. Labeo in libris, quos ad duodecim tabulas conſcripſit, non probaret; quidam, inquit, Lucius Veratius fuit, egregie homo improbus atque immani vecordia; is pro delectamento habebat os hominis liberi manus ſuæ palma verberare. Eum ſervus ſequebatur crumenam plenam aſſium portitans: et, quemcunque depalmaverat, numerari ſtatim ſecundum duodecim tabulas viginti et quinque aſſes jubebat. Propterea, inquit, prætores poſtea hanc abolefcere et relinqui cenſuerunt; injuriiſque æſtimandis recuperatores ſe daturos edixerunt.* Noct. att. lib. 20. cap. 1.

De lege Cornelia.

§ VIII. Sed et lex Cornelia de injuriis loquitur, et injuriarum actionem introduxit, quæ competit ob eam rem, quod ſe pulſatum quis, verberatumve, vel domum ſuam vi introitam eſſe, dicat. Domum autem accipimus, ſive in propria domo quis habitet, ſive in conducta, ſive gratis, ſive hoſpitio receptus ſit.

§ 8. *The law* Cornelia *ſpeaks alſo of injuries, and hath introduced an action, which lies, when a man alleges, that he hath been ſtruck or beaten, or that another hath entered forcibly into his houſe; and any man is allowed in this caſe to allege an houſe to be his own, whether it is in reality his, or whether he only hires or borrows it, or even lives in it as a gueſt.*

Sed et lex Cornelia.] " Tres ſunt cauſæ, ex " quibus etiam lex Cornelia actionem injuria- " rum dedit, quod quis pulſatus, verberatuſve, " domuſve ejus vi introita ſit. *ff.* 47. *t.* 10. *l.* 5. " Nam etſi actio prætoria ad omnes injurias " pertinebat tam quæ manu quam quæ verbis

" fiunt, eam tamen non niſi civiliter inſtituere " licebat: cum itaque prætoria illa actio civilis " impar cohibendæ hominum petulantiæ vide- " retur, Cornelius Sulla dictator novam tulit " legem *Corneliam de injuriis*, qua et criminale " judicium conſtitutum eſt ob certas injurias, " ob quas alias etiam civiliter agere licebat." *Vinn. h. l. Hein. ſyn. l. 4. t. 4.*

De æſtimatione atrocis injuriæ.

§ IX. Atrox injuria æſtimatur vel ex facto, veluti ſi quis ab alio vulneratus ſit, vel fuſtibus cæſus; vel ex loco, veluti ſi cui in theatro, vel in foro, vel in conſpectu prætoris, injuria facta ſit; vel ex perſona, veluti ſi magiſtratus injuriam paſſus fuerit, vel ſi ſenatori ab humili perſona injuria facta ſit, aut parenti patronove fiat à liberis vel libertis. Aliter enim ſenatoris et parentis patronique, aliter extranei et humilis perſonæ injuria æſtimatur. Nonnunquam & locus vulneris atrocem injuriam facit, veluti ſi in oculo quis percuſſus fuerit. Parvi autem refert, utrum patri-familias, an filio-familias, talis injuria facta ſit: nam et hæc atrox injuria æſtimabitur.

§ 9. *An injury is eſteemed atrocious, ſometimes from the nature of the fact, as when a man is wounded by another, or beaten with a club —— ſometimes from the place, as when an injury is done in a public theater, in an open market, or in the preſence of the prætor —— and ſometimes by reaſon of the rank of the perſon, as when a magiſtrate, or a ſenator, receives an injury from one of mean condition; or when a parent is injured by his child, or a patron by his freed-man; for an injury, done to a ſenator, or to a parent by his child, or to a patron by his freed-man, muſt be attoned for by an heavier puniſhment, than an injury done to a ſtranger, or a perſon of low degree. Alſo the part, in which a wound is given, may conſtitute an injury atrocious; as if a man ſhould be wounded in his eye; but it makes no manner of alteration, whether ſuch an injury is done to the father of a family, or to the ſon of a family; for the injury will neither be the more nor the leſs atrocious upon this account.*

De judicio civili et criminali.

§ X. In ſumma ſciendum eſt, de omni injuria eum, qui paſſus eſt, poſſe vel criminaliter agere, vel civiliter. Et, ſi quidem civiliter agatur, æſtimatione facta, ſecundum quod dictum eſt, pœna reo imponitur; ſin autem criminaliter, officio judicis extraordinaria pœna reo irrogatur. Hoc videlicet obſervando, quod Zenoniana conſtitutio introduxit, ut viri illuſtres, quique ſuper eos ſunt, et per procuratores poſſint actionem injuriarum criminaliter vel perſequi vel ſuſcipere, ſecundum ejus tenorem, qui ex ipſa manifeſtius apparet.

§ 10. *In fine, it muſt be obſerved concerning every injury, that the party injured may ſue the offending party either criminally or civilly. If the party injured ſues civilly, the damage occaſioned by the injury muſt be eſtimated, and the penalty injoined accordingly, as we have before noticed: but, if he ſues criminally, it is the duty of the judge to inflict an extraordinary puniſhment upon the offender; obſerving the conſtitution of* Zeno, *which permits all perſons, who have a right to be called* illuſtrious, *and of conſequence all, who enjoy a ſuperior title, either to perſue or defend criminally*

any

any action of injury by their proctors; but the tenor of this law will more fully appear by a peruſal of the ordinance itſelf.

Zenoniana conſtitutio.] *vid. Cod. 9. t. 35. l. 11. Cod. 12. t. 8. l. 2. ut dignitatum ordo ſervetur.*

Qui tenentur injuriarum.

§ XI. Non ſolum autem is injuriarum tenetur, qui fecit injuriam, id eſt, qui percuſſit; verum ille quoque tenetur, qui dolo fecit injuriam, vel qui procuravit, ut cui mala pugno percuteretur.

§ 11. *An action of injury does not only lie againſt him, who hath done an injury, by giving a blow,* &c. *but alſo againſt him, who by his craft and perſuaſion hath cauſed the injury to be done.*

Quomodo tollitur hæc actio.

§ XII. Hæc actio diſſimulatione aboletur; et ideo, ſi quis injuriam dereliquerit, hoc eſt, ſtatim paſſus ad animum ſuum non revocaverit, poſtea ex pœnitentia remiſſam injuriam non poterit recolere.

§ 12. *All right to an action of injury may be loſt by diſſimulation; and therefore, if a man takes no notice of an injury at the time, in which he receives it, he cannot afterwards, altho' he repents of his former behavior, commence a ſuit on account of that injury.*

TITULUS QUINTUS.

De obligationibus, quæ quaſi ex delicto naſcuntur.

D. xlvii. T. 5. C. ix. T. 3.

Si judex litem ſuam fecerit.

SI judex litem ſuam fecerit, non proprie ex maleficio obligatus videtur: ſed quia neque ex maleficio, neque ex contractu obligatus eſt, et utique peccaſſe aliquid intelligitur, licet per imprudentiam, ideo videtur quaſi ex maleficio teneri, et, in quantum de ea re æquum religioni judicantis videbitur, pœnam ſuſtinebit.

If a judge makes a ſuit his own, by giving an unjuſt determination, an action of male-feazance will not properly lie againſt him: but, altho' he is not ſubject to an action of male-feazance, or of contract, yet, as he hath certainly committed a fault, altho' it was not by deſign, but thro' imprudence and want of ſkill,

be may be ſued by an action of quaſi-*male-feazance*; *and muſt ſuffer ſuch a penalty, which ſeems equitable to the conſcience of a ſuperior judge.*

Litem ſuam fecerit.] i. e. litem in ſeipſum convertit. *Theoph.*

De dejectis vel effuſis, et poſitis aut ſuſpenſis.

§ I. Item is, cujus ex cœnaculo, vel proprio ipſius, vel conducto, vel in quo gratis habitat, dejectum effuſumve aliquid eſt, ita ut alicui noceret, quaſi ex maleficio obligatus intelligitur. Ideo autem non proprie ex maleficio obligatus intelligitur, quia plerumque ob alterius culpam tenetur, aut ſervi aut liberi. Cui ſimilis eſt is, qui ea parte, qua vulgo iter fieri ſolet, id poſitum aut ſuſpenſum habet, quod poteſt, ſi ceciderit, alicui nocere: quo caſu pœna decem aureorum conſtituta eſt. De eo vero, quod dejectum effuſumve eſt, dupli, quantum damni datum ſit, conſtituta eſt actio. Ob hominem vero liberum occiſum, quinquaginta aureorum pœna conſtituitur. Si vero vivat, nocitumque ei eſſe dicatur, quantum ob eam rem æquum judici videtur, actio datur. Judex enim computare debet mercedes medicis præſtitas, cæteraque impendia, quæ in curatione facta ſunt; præterea operas, quibus caruit aut cariturus eſt, ob id quod inutilis eſt factus.

§ 1. *Whoever occupies a chamber, from whence any thing hath been either thrown or ſpilt, by which damage is done, he is liable to an action of* quaſi-*male-feazance*; *and it is not material, whether the chamber is the property of the occupier; whether he pays rent for it; or whether he inhabits it* gratis: *and the reaſon, why ſuch occupier is not ſuable for a direct male-feazance, is, becauſe he is generally ſued for the fault of another. Any man is alſo ſubject to the ſame action, who hath hung or placed any thing in a public road, ſo as to indanger paſſengers by the fall of it; in which caſe, a penalty of ten* aurei *is appointed; but, when any thing hath been thrown or ſpilt, the action is always for the double of what the damage amounts to. If a freeman is killed by accident, the penalty is fifty* aurei; *but, if he only receives ſome hurt, the quantum of the damage is at the diſcretion of the judge, who ought to take the fees of the phiſician into the account, and all other expenſes, attendent upon the cure, over and above the time, which the patient hath loſt in his illneſs, or may loſe by being unable to perſue his buſineſs.*

De filiofam, ſeorſum habitante à patre.

§ II. Si filius-familias ſeorſum à patre habitaverit, et quid ex cœnaculo ejus dejectum effuſumve fuerit, ſive quid poſitum ſuſpenſumve habuerit, cujus caſus periculoſus eſt, Juliano placuit, in patrem nullam eſſe actionem, ſed cum ipſo filio agendum eſſe. Quod et in filio-familias judice obſervandum eſt, qui litem ſuam fecerit.

§ 2. *If the ſon of a family lives ſeparate from his father, and any thing is either thrown, or ſpilt, from his apartment, or ſo hung, or placed, that the fall of it may do damage, it is the opinion of* Julian, *that no action will lie againſt the father, and that the ſon only can be ſued. The ſame rule of law is alſo to be obſerved, in regard to the ſon of a family, who hath acted as a judge, and given an unjuſt determination.*

De

De damno aut furto, quod in navi, aut caupona, aut ſtabulo, factum eſt.

§ III. Item exercitor navis, aut cauponæ, aut ſtabuli, de damno aut furto, quod in navi, aut caupona, aut ſtabulo, factum erit, quaſi ex maleficio teneri videtur; ſi modo ipſius nullum eſt maleficium, ſed alicujus eorum, quorum opera navem, aut cauponam, aut ſtabulum, exercet. Cum enim neque ex maleficio, neque ex contractu, ſit adverſus eum conſtituta hic actio, et aliquatenus culpæ reus eſt, quod opera malorum hominum uteretur, ideo quaſi ex maleficio teneri videtur. In his autem caſibus in factum actio competit; quæ hæredi quidem datur, adverſus hæredem autem non competit.

§ 3. *The maſter of a ſhip, tavern, or inn, is liable to be ſued for a* quaſi-*male-feazance, on account of every damage, or theft, done or commited in any of theſe places, by himſelf or his ſervants: for altho' no action, either of direct male-feazance, or of contract, can be brought againſt the maſter, yet, as he has, in ſome meaſure, been guilty of a fault in imploying diſhoneſt perſons as his ſervants, he is therefore ſubject to a ſuit for a* quaſi-*malc-feazance. But, in all theſe caſes, the action given is an action upon the fact, which may be brought in favor of an heir, but not againſt him.*

Item exercitor.] By the law of *England* an inn-keeper ſhall be charged, if there is any default in him or his ſervants in keeping the goods of a gueſt; for an innholder is bound by law to keep them ſafe; and it is no excuſe to ſay, that he delivered the gueſt the key of the chamber-door, and that the gueſt left it open. And altho' the gueſt does not deliver his goods to the innholder to keep, yet, if they are ſtolen, even by perſons unknown, the innholder is chargeable; for, in this caſe, either the innholder, or his ſervants, are in fault for their neglect. 8 *rep.* 32. *Calye's caſe.*

TITULUS SEXTUS.

De actionibus.

D. xliv. T. 7. C. iv. T. 10.

Definitio.

SUpereſt, ut de actionibus loquamur. Actio nihil aliud eſt, quam jus perſequendi in judicio, quod ſibi debetur.

It now remains, that we ſhould treat of actions. An action is nothing more, than the right, which every man has, of bringing an action at law for whatever is due to him.

Diviſio

Diviſio prima.

§ I. Omnium autem actionum, quibus inter aliquos apud judices arbitroſve de quacunque re quæritur, ſumma diviſio in duo genera deducitur: aut enim in rem ſunt, aut in perſonam: namque agit unuſquiſque aut cum eo, qui ei obligatus eſt, vel ex contractu, vel ex maleficio; quo caſu proditæ ſunt actiones in perſonam, per quas intendit, adverſarium ei dare aut facere oportere, et aliis quibuſdam modis: aut cum eo agit, qui nullo jure ei obligatus eſt, movet tamen alicui de aliqua re controverſiam: quo caſu proditæ actiones in rem ſunt: veluti ſi rem corporalem poſſideat quis, quam Titius ſuam eſſe affirmet, poſſeſſor autem dominum ejus ſe eſſe dicat: nam, ſi Titius ſuam eſſe intendat, in rem actio eſt.

§ 1. *All actions in general, whether they are determinable before judges or arbitrors, muſt be primarily divided into two kinds, real and perſonal; for the plaintiff muſt ſue the defendent, either becauſe the defendent is obligated to him by contract, or hath been guilty of ſome male-feazance; and, in this caſe, the action muſt be perſonal, in which the plaintiff alleges, that his adverſary is bound to give, or to do ſomething for his ſervice, or ſome other matter, as the occaſion requires: or otherwiſe, the plaintiff muſt ſue the defendent, on account of ſome corporeal thing, when there is no obligation; in which caſe the action muſt be real: as for example, if* Sempronius *poſſeſſes land, which* Titius *affirms to be his property, the other denying it,* Titius *muſt bring a real action againſt* Sempronius *for the recovery.*

Judices, arbitroſve.] " Judicum nomine intelligit judices addictos actionibus ſtricti juris: " arbitrorum, addictos judiciis bonæ fidei. *Vinn.*

In rem ſunt, aut in perſonam] Actions, by the law of *England*, are divided into real, perſonal, and mixed. Actions real, or relating to lands, are either *poſſeſſory*, or *petitory*; *poſſeſſory*, if they vindicate a right derived from an anceſtor; and *petitory*, if they complain of the violation of a right, of which we were poſſeſſed. But the law always diſtinguiſhed between a right of entry and a naked right, and therefore gave different remedies in each caſe: for, in order to recover the naked right, the law only allowed a writ of right; and, in this action, the defendent, at his election, might either be tried by a ſingular wage battel: but, when the perſon diſſeiſed had a right of entry, it was preſumed, that the diſſeiſin was freſh and recent, and therefore the trial was by twelve men. But, if the diſſeiſee did not come, till the heir of the diſſeiſor was ſeiſed in his poſſeſſion, and had paid a relief, or fine, to the lord, then the entry of the diſſeiſee was taken away, and his title became doubtful: and then the judges appealed to providence in their deciſions; ſo that, if any champion could fight with his own body, defend the right of his poſſeſſion, the demandant was obliged to find a champion to enter the liſts for him.

But the antient way of recovering the right of poſſeſſion was by a writ of entry, and then the iſſue, *diſſeiſed*, or not *diſſeiſed*, was always tried by a jury; for, when the diſſeiſin was recent, our anceſtors made no appeal to providence, reſerving that remedy for thoſe caſes only, in which the long poſſeſſion had rendered the right doubtful. *Bac. abr. vol.* 1. *p.* 27.

But it is here proper to obſerve, " that, in a " writ of right, neither the tenent, nor the " demandant, ſhall fight for themſelves; but " muſt find a champion to fight for them; be- " cauſe, if either tenent, or demandant, ſhould " be ſlain, no judgement could be given for " the lands or tenements in queſtion: yet, in " an appeal for murder, the defendent ſhall fight " for himſelf, and ſo ſhall the plaintiff; for, if " the defendent is ſlain, the plaintiff hath the " effect of his ſuit; *i. e.* the death of the de- " fendent. *Co. Litt.* 295." As to the order and ſolemnity of a trial by battel, ſee the *year-books*, 29 *Edw.* 3. *p.* 12. 30 *Edw.* 3. *p.* 20. 1 *H.* 6. *p.* 7. *Spel. gloſſ.* campus. *Origines juridiales*, *p.* 65.

But trial by combat, being thought by ſome to be unchriſtian, king *Hen.* the ſecond refered it to the choice of the perſon challenged [*viz.* the ſuppoſed wrong doer, or defendent] whether he would defend his title to the land in queſtion by

by battel, or put it upon trial by a jury of twelve good and lawfull men, which trial was then, and hath ever ſince been called the trial by great aſſiſe. *vid. Glan. l. 2. cap. 2. Orig. jud. 71.* And combat continues to be even now a method of trial in conſequence of a real action, if the defending party is ſo diſpoſed. But, proceedings upon real actions being dilatory and expenſive, and, in many caſes, concluding the party upon one trial, a more commodious method was contrived of diſputing a title to lands; which began in the reign of *Hen. 7.* by bringing a mixed action, called an ejectment: and it is probable, that the laſt real action, in which battel was waged, was in the 13th year of *Eliz.* in the caſe of *Lowe* and *Kime* againſt *Paramour*, which is very fully reported by *Dyer*, p. 301. But trial by battel, on a criminal accuſation, was laſt admited in the 6th year of king *Charles* the firſt, between *Donnold* lord *Rey*, appellant, and *David Ramſey*, defendent, in the painted chamber at *Weſtminſter*, before *Robert* earl of *Lindſey*, lord high conſtable, and *Thomas* earl of *Arundel*, earl-marſhal, with other lords; where, after the court had met ſeveral times, it was at laſt determined, that the matter ſhould be refered to the king's will and pleaſure. *ſee Blount's dict. combat.*

The oath of each of the combatants was, upon theſe occaſions, to the very great diſgrace of our anceſtors, in the following moſt ridiculous terms. *viz. Hoc audite o juſticiarii, quod ego nec comedi, nec bibi, nec aliquis per me nec pro me, propter quod lex Dei deprimi debeat et lex diaboli exaltari. Bract. de corona lib. 3. cap. 21.* "Hear "this, O ye judges, that I have neither eat "nor drank any thing, nor any other by my "procurement, or for me, by which the law "of God may be depreſſed, or the law of the "devil exalted."

A perſonal action is that, which one man hath againſt another, by reaſon of any contract for money or goods, or for offenſe done by him, or ſome other perſon, for whoſe fact he is by law anſwerable.

And a mixed action is that, which lies indifferently againſt the thing detained, or againſt the perſon of the detainer, and is ſo called, becauſe it hath a mixed reſpect, both to the thing and the perſon; or, as others define it, it is a ſuit given by law, to recover the thing demanded, and damages alſo for the wrong done; as in an aſſiſe of novel diſſeiſin, which writ, if the diſſeiſor makes a feofment to another, the diſſeiſee ſhall be intituled to againſt the diſſeiſor, and the feoffee, or other ter-tenent, to recover not only the land, but damages alſo.

Actions of waſte, *quare impedit*, ejectment, *&c.* are alſo mixed. *Bac. abr. v. 1. p. 28. Blount's dict. &c.*

De actione confeſſoria, et negatoria.

§ II. Æque, ſi agat quis, jus ſibi eſſe fundo forte, vel ædibus utendi fruendi, vel per fundum vicini eundi agendi, vel ex fundo vicini aquam ducendi, in rem actio eſt. Ejuſdem generis eſt actio de jure prædiorum urbanorum; veluti, ſi quis agat, jus ſibi eſſe altius ædes ſuas tollendi, proſpiciendive, vel projiciendi aliquid, vel immittendi tignum in vicini ædes. Contra quoque de uſufructu, et de ſervitutibus prædiorum ruſticorum, item prædiorum urbanorum, invicem quoque proditæ ſunt actiones: ut ſi quis intendat, jus non eſſe adverſario utendi fruendi, eundi agendi, aquamve ducendi; item altius tollendi, proſpiciendive, vel projiciendi, immittendive; iſtæ quoque actiones in rem ſunt, ſed negativæ: quod genus actionis in controverſiis rerum corporalium proditum non eſt; nam in his is agit, qui non poſſidet; ei vero, qui poſſidet, non eſt actio prodita, per quam neget rem actoris eſſe. Sane non uno caſu, qui poſſidet, nihilhominus is actoris partes obtinet; ſicut in latioribus digeſtorum libris opportunius apparebit.

§ 2. *Alſo, if any man brings an action, alleging, that he has a right to the uſufruct of a field, or houſe, or a right of driving his cattle, or of drawing water in the land of his neighbour, ſuch action is denominated real. And an action relating to the rights of houſes or city eſtates, which rights are called ſervices, is of the ſame kind; as when a man commences a ſuit, and alleges, that he has a right to*

proſpect, a right to raiſe the height of his houſe, a right of making a part of it to project, or a right of laying the beams of his building upon his neighbour's walls. There are alſo contrary actions to theſe, which relate to uſu-fructs, and the rights of country and city eſtates; as when the complainant alleges, that his adverſary is not *intituled to the uſufruct of a particular ground, or to the right of paſſage,* &c. &c. *theſe actions are alſo real, but are negative in their nature, and cannot therefore be uſed in regard to things corporeal; for, in reſpect to things corporeal, the agent, or plaintiff, is the perſon out of poſſeſſion; for a poſſeſſor can bring no action: there are however, many caſes, in which a poſſeſſor may be obliged to act the part of a plaintiff; but we refer the reader to the books of the digeſts.*

Sane non uno caſu.] Others read, *ſane uno caſu*, but the inſertion of *non* ſeems moſt conformable to the words of *Juſtinian*, in the latter part of this ſection; for the emperor does not ſay, that the poſſeſſor of a corporeal thing can ever become plaintiff, by commencing a ſuit; but that he may perform the part of a plaintiff, *partes actoris*; which is only ſaying, that he may be obliged to take the proof upon himſelf, which often happens. *Vinn.*

De actionibus prætoriis realibus.

§ III. Sed iſtæ quidem actiones, quarum mentionem habuimus, et ſi quæ ſunt ſimiles, ex legitimis et civilibus cauſis deſcendunt. Aliæ autem ſunt, quas prætor ex ſua juriſdictione comparatas habet tam in rem, quam in perſonam: quas et ipſas neceſſarium eſt exemplis oſtendere: ut ecce, plerumque ita permittit prætor in rem agere, ut vel actor dicat ſe quaſi uſucepiſſe, quod non uſuceperit, vel ex diverſo poſſeſſor dicat, adverſarium ſuum non uſucepiſſe, quod uſuceperit.

§ 3. *The actions, of which we have made mention, and all actions of a ſimilar nature, are derived from the civil law: but the prætor, by virtue of his juriſdiction, hath introduced other actions, both real and perſonal, of which it will be neceſſary to give ſome examples: for he often permits a real action to be brought, either by allowing the demandant to allege, that he hath acquired, by preſcription, what he hath not ſo acquired; or, on the contrary, by permiting a former poſſeſſor to allege, that his adverſary hath not acquired by preſcription, what, in reality, he hath ſo acquired.*

De Publiciana.

§ IV. Namque, ſi cui ex juſta cauſa res aliqua tradita fuerit, (veluti ex cauſa emptionis, aut donationis, aut dotis, aut legatorum,) et nec-dum ejus rei dominus effectus eſt, ſi is ejus rei poſſeſſionem caſu amiſerit, nullam habet in rem directam actionem ad eam perſequendam: quippe ita proditæ ſunt jure civili actiones, ut quis dominium ſuum vindicet. Sed, quia ſane durum erat, eo caſu deficere actionem, inventa eſt à prætore actio, in qua dicit is, qui poſſeſſionem amiſit, eam rem ſe uſucepiſſe, quam uſu non cepit, et ita vindicat ſuam eſſe: quæ actio Publiciana appellatur, quoniam primum à Publicio prætore in edicto propoſita eſt.

§ 3. *If any particular thing, belonging to one man, ſhould be delivered in truſt to another, that it might be depoſited with him upon ſome juſt account, as by reaſon of a purchaſe, a gift, a marriage, or a bequeſt, and it ſhould ſo happen, that ſuch truſtee ſhould*

ſhould loſe the poſſeſſion, before he hath gained a property in the thing poſſeſſed, he could have no direct action for the recovery of it; inaſmuch as real actions are given by the law for the re-vindication of thoſe things only, in which a man hath a veſted property or dominion. But, it being hard, that an action ſhould be wanting in ſuch a caſe, the prætor hath ſupplied one, in which the perſon, who hath loſt his poſſeſſion, is allowed to aver, that he hath a preſcriptive right to the thing in queſtion, altho' he hath not obtained it; and he may thus recover the poſſeſſion. This action is called actio Publiciana, *becauſe it was firſt inſtituted by the edict of* Publicius *the prætor.*

De reſciſſoria.

§ V. Rurſus ex diverſo, ſi quis, cum reipublicæ cauſa abeſſet, vel in hoſtium poteſtate eſſet, rem ejus, qui in civitate eſſet, uſuceperit, permittitur domino, ſi poſſeſſor reipublicæ cauſa abeſſe deſierit, tunc intra annum reſciſſa uſucapione eam rem petere, id eſt, ita petere, ut dicat, poſſeſſorem uſu non cepiſſe, et ob id ſuam rem eſſe. Quod genus actionis quibuſdam et aliis ſimili æquitate motus prætor accommodat; ſicut ex latiore digeſtorum ſeu pandectarum volumine intelligere licet.

§ 5. *On the contrary, if any man, whileſt he is abroad in the ſervice of his country, or a priſoner in the hands of the enemy, ſhould gain a preſcriptive title to a thing, which belongs to another, who was not abroad, then the former proprietor is permited at any time, within a year after the return of the poſſeſſor, to bring an action againſt him, the preſcriptive title being reſcinded, and the proprietor being allowed to allege, that the poſſeſſor hath not effectually preſcribed, and that therefore the thing in litigation is his own. The ſame motive of equity hath alſo induced the prætor to allow the uſe of this ſpecies of action to certain other perſons, as we may learn more at large from the digeſts.*

Quibuſdam et aliis.] That is, to perſons (for example) who had been abſent upon a juſt account; for every man, who had been neceſſarily abroad, was alſo allowed to take the benefit of this action to recover his right of poſſeſſion againſt thoſe, who had reſided at home. *Cod.* 8. *t.* 51. *l.* 18. *Vinn.*

And to this we have ſomething ſimilar in the law of *England*; for, if any perſon is diſpoſſeſſed of his eſtate, whileſt he is in durance, and, if the lands even deſcend to the heir of the diſſeiſor, the diſſeiſee has liberty, by his own proper act, to re-enter; and, if judgment is given againſt him, he may reverſe it afterwards by a writ of error, becauſe his abſence was not contumacious. And there is the ſame law for thoſe, who are in the king's ſervice, or are beyond the ſeas on any buſineſs, which concerns the commonwealth; and ſome affirm, that, if a man is abroad upon his own buſineſs, and is diſſeized, he may, at his return, re-enter upon the heir of the diſſeiſor, even without bringing an aſſiſe. *Co. Litt.* § 436. 439. 440. *continual claim.* Any invaſion of the right of perſons in priſon, or beyond ſea, is alſo guarded againſt by various acts of parliament. 5 *H.* 4. *c.* 14. 4 *H.* 7. *c.* 24 *etc.*

De Pauliana.

§ VI. Item, ſi quis in fraudem creditorum rem ſuam alicui tradiderit, bonis ejus a creditoribus poſſeſſis ex ſententia præſidis, permittitur ipſis creditoribus reſciſſa traditione eam rem petere, id eſt, dicere eam rem traditam non eſſe, et ob id in bonis debitoris manſiſſe.

§ 6. *If a debtor diſpoſes of any thing, by delivering it to ſome perſon in order to defraud his creditors, the creditors are then permited, notwithſtanding the delivery,*

to bring an action for the thing, if they have previouſly obtained the ſentence of the proper magiſtrate, for putting themſelves into poſſeſſion; that is, they are allowed to plead, that the thing was not delivered, and of courſe, that it continues to be a part of their debtor's goods.

Si quis in fraudem] In *England*, the effect of the action *Pauliana*, is fully anſwered by the 13th of *Eliz. cap.* 5. which renders void every alienation of lands or goods, made to defraud creditors, and inflicts a penalty upon all, who are parties to ſuch fraudulent alienations. *Cowel. h t.*

De Serviana et quaſi-Serviana, ſeu hypothecaria.

§ VII. Item Serviana, et quaſi Serviana, (quæ etiam hypothecaria vocatur,) ex ipſius prætoris juriſdictione ſubſtantiam capiunt. Serviana autem experitur quis de rebus coloni, quæ pignoris jure pro mercedibus fundi ei tenentur. Quaſi Serviana autem eſt, qua creditores pignora hypothecaſve perſequuntur. Inter pignus autem & hypothecam, (quantum ad actionem hypothecariam attinet,) nihil intereſt: nam de qua re inter creditorem et debitorem convenerit, ut ſit pro debito obligata, utraque hac appellatione continetur: ſed in aliis differentia eſt. Nam pignoris appellatione eam proprie rem contineri dicimus, quæ ſimul etiam traditur creditori, maxime ſi mobilis ſit; at eam, quæ ſine traditione nuda conventione tenetur, proprie hypothecæ appellatione contineri dicimus.

§ 7. *Alſo the action* Serviana, *and the action* quaſi-Serviana, *(which is alſo called hypothecary,) both take their riſe from the prætor's juriſdiction. By the action* Serviana, *a ſuit may be commenced for the ſtock and cattle of a farmer, which are obligated as a pledge for the rent of the ground, which he farms of his landlord. The action* quaſi-Serviana *is that, by which a* creditor *may ſue for a thing pledged or hypothecated to him; and, in regard to this action, there is no difference between a pledge and an hypotheque; tho' in other reſpects they differ; for, by the term pledge, is meant that, which hath actually been delivered to a creditor, eſpecially if the thing was a moveable; and, by the word hypotheque, we comprehend what is obligated to a creditor by a mere agreement only, without a delivery.*

Item Serviana.] The law of *England* ſeems to go farther in this than the *Roman* law; for a leſſor in *England* may, of proper right, diſtrain the effects and cattle, which are brought upon his fee, and detain them, till his rent is ſatisfied; for they are regarded as a gage or pledge: and even the cattle of a ſtranger, eſcaping into his neighbour's grounds, and being there *levant* and *couchant*, may be diſtreined by the leſſor; for it ſhall be imputed to the owner's folly, that he did not provide againſt this miſchief, by proper bounds and fences. *Bro* 13. 57. 97. *Bacon's Abr.* 108. 109. *vol.* 2. diſtreſs.

De actionibus prætoriis perſonalibus.

§ VIII. In perſonam quoque actiones ex ſua juriſdictione propoſitas habet prætor, veluti de pecunia conſtituta: cui ſimilis videbatur receptitia. Sed ex noſtra conſtitutione, (cum, et ſi quid plenius habebat, hoc in actionem pecuniæ conſtitutæ transfuſum eſt,) et ea quaſi ſupervacua juſſa eſt cum ſua auctoritate a noſtris legibus recedere. Item prætor

propoſuit actionem de peculio ſervorum, filiorumque familiarum; et eam, ex qua quæritur, an actor juraverit; et alias complures.

§ 8. *Perſonal actions have alſo been introduced by the prætors, in conſequence of their authority; ſuch is the action* de pecunia conſtituta; *which much reſembles that called* receptitia; *which we have now taken away by our conſtitution, as unneceſſary; and whatever advantageous matter it contained, we have added it to the action* de pecunia conſtituta. *The prætors have likewiſe introduced the action concerning the* peculium *of ſlaves, and the ſons of families; and alſo the actions, in which the only queſtion is, whether the plaintiff hath made oath of his debt; they have likewiſe introduced many others.*

Receptitia.] "Hæc actio tantum ad trapezitas ſive menſarios aut argentarios pertinebat, apud quos, ut tum moris erat, pecuniæ et res civium Romanorum deponebantur. Itaque, ſi menſarius citra ſtipulationem recepiſſet, ſe certo die ſoluturum, quod hic vel ille apud ſe depoſuiſſet, hoc conventionis genus *receptum* dicebatur, et actio, quæ ex ea re competebat, *receptitia*, ſive pecuniæ receptæ." *Vinn.*

Ex noſtra conſtitutione.] *C.* 4. *t.* 18. *l.* 2. *de conſtituta pecunia.*

De conſtituta pecunia.

§ IX. De conſtituta autem pecunia cum omnibus agitur, quicunque vel pro ſe, vel pro alio, ſoluturos ſe conſtituerint, nulla ſcilicet ſtipulatione interpoſita. Nam alioqui, ſi ſtipulanti promiſerint, jure civili tenentur.

§ 9. *A ſuit may be commenced by the action* de pecunia conſtituta, *againſt any perſon, who hath ingaged to pay money, either for himſelf or another, without ſtipulation; but, when there is a ſtipulation, the prætorian action is not wanted; for the performance of the promiſe may be inforced by the civil law.*

De peculio.

§ X. Actiones autem de peculio ideo adverſus patrem dominumve comparavit prætor, quia licet ex contractu filiorum ſervorumve ipſo jure non teneantur, æquum tamen eſt, peculio tenus, (quod veluti patrimonium eſt filiorum filiarumque, item ſervorum,) condemnari eos.

§ 10. *The prætor hath alſo given actions* de peculio *againſt fathers and maſters, inaſmuch as they are not legally bound by the contracts of their children and ſlaves: it is therefore but equity, that parents and maſters ſhould be condemned to pay to the extent of a* peculium, *which is, as it were, the patrimony, and ſeparate eſtate of a ſon, a daughter, or a ſlave.*

De actione in factum ex jurejurando.

§ XI. Item, ſi quis poſtulante adverſario juraverit, deberi ſibi pecuniam, quam peteret, neque ei ſolvatur, juſtiſſime accommodat ei talem actionem, per quam non illud quæritur, an ei pecunia debeatur, ſed an juraverit.

§ 11. *Alſo if any man, at the prayer or requeſt of the adverſe party, makes oath, that the debt, which he ſues for, is unpaid and due to him, he thus becomes intituled*

to an action upon the fact; in which no inquiry is made, whether the debt is due, but whether the oath hath been taken.

De actionibus pœnalibus.

§ XII. Pœnales quoque actiones prætor pene multas ex ſua juriſdictione introduxit: veluti adverſus eum, qui quid ex albo ejus corrupiſſet: et in eum, qui patronum vel parentem in jus vocaſſet, cum id non impetraſſet: item adverſus eum, qui vi exemerit eum, qui in jus vocaretur, cujuſve dolo alius exemerit: et alias innumerabiles.

§ 12. *The prætors have alſo introduced a great number of penal actions, by virtue of their authority. But, to mention ſome only out of many, they have provided for inſtance an action againſt him, who hath wilfully damaged or eraſed an edict; againſt an emancipated ſon, or a freed-man, who hath commenced a ſuit againſt his parent or patron, without a previous permiſſion from the proper magiſtrate; and alſo againſt any perſon, who by force or fraud hath hindered another from appearing to the proceſs of a court of juſtice. But theſe are only ſome inſtances out of a great number, which might be produced.*

De præjudicialibus actionibus.

§ XIII. Præjudiciales actiones in rem eſſe videntur: quales ſunt, per quas quæritur, an aliquis liber, an libertus ſit, vel ſervus, vel de partu agnoſcendo. Ex quibus fere una illa legitimam cauſam habet, per quam quæritur, an aliquis liber ſit? cæteræ ex ipſius prætoris juriſdictione ſubſtantiam capiunt.

§ 13. *Prejudicial actions are alſo real; ſuch are thoſe, by which it is inquired, whether a man is born free, or made free; whether he is a ſlave, or a baſtard? but of theſe actions, that only proceeds from the civil law, by which it is inquired, whether a man is free born? the reſt all take their riſe from the prætor's juriſdiction.*

Præjudiciales actiones.] *Bracton* gives the following account of prejudicial actions. *Præjudiciales ſunt, quæ oriuntur ex incidentibus quæſtionibus vel emergentibus, in quibus quæritur, utrum aliquis ſit ingenuus vel libertinus, liber vel ſervus, filius an non, et, ſi filius, utrum legitimus vel baſtardus, et hujuſmodi; et dicuntur præjudiciales actiones, quia prius judicantur, quam actio principalis.*

Angl. "Thoſe actions are called prejudicial, "which ariſe from incident queſtions, in which "it is inquired, whether a man is born free, or "not? and, if not born free, whether he is a freed-"man, or a ſlave? Alſo, whether a man is the "ſon of another, or not? and, if he is the ſon, "whether he is the legitimate ſon, or a baſ-"tard?"

"All theſe, and the like actions, or iſſues, are "termed prejudicial, becauſe they muſt be ad-"judged and determined before the principal "action." *Brac. lib.* 3. *cap.* 4. *n.* 9.

An res ſua condici poſſit.

§ XIV. Sic itaque diſcretis actionibus, certum eſt, non poſſe actorem ſuam rem ita ab aliquo petere, *ſi paret, eum dare oportere.* Nec enim, quod actoris eſt, id ei dari oportet: ſcilicet, quia dari cuiquam id intelligitur, quod ita datur, ut ejus fiat: nec res, quæ jam actoris eſt, magis ejus fieri poteſt. Plane odio furum, quo magis pluribus actionibus

nibus teneantur, effectum eſt, ut, extra pœnam dupli aut quadrupli, rei recipiendæ nomine, fures etiam hac actione teneantur, *ſi appareat, eos dare oportere:* quamvis ſit adverſus eos etiam hæc in rem actio, per quam rem ſuam quis eſſe petit.

§ 14. *Actions being thus divided into real and perſonal, it is certain, that a man cannot ſue for his own property by a condiction, or a perſonal action in the following form, viz.* if it appears, that the defendent ought to GIVE it me: *for the act of* giving *implies the confering of property, and therefore that, which is the property of the plaintiff, can never be underſtood to be given to him, or to become more his own, than it already is. But, notwithſtanding this, in order to ſhew a deteſtation for thieves and robbers, and to increaſe the number of actions, which may be brought againſt them, it hath been determined, that, beſides the double and quadruple penalty, to which they are liable, they may be perſued by a condiction for the thing taken, in the very form before recited,* if it appears that they ought to GIVE it. *And this is allowed, altho' the party injured may alſo bring a real action againſt them, by which he may demand the thing taken, as his own.*

De nominibus actionum.

§ 15. Appellamus autem in rem quidem actiones vindicationes: in perſonam vero actiones, quibus dare aut facere oportere intenditur, condictiones. Condicere enim eſt denuntiare, priſca lingua. Nunc vero abuſive dicimus, condictionem actionem in perſonam eſſe, qua actor intendit dari ſibi oportere. Nulla enim hoc tempore eo nomine denuntiatio fit.

§ 15. *Real actions are called vindications; and perſonal actions, in which it is intended, that ſomething ought to be done or given, are called condictions: for the word* condicere *was in our old language of the ſame import with* denuntiare *to denounce; but the term condiction is now improperly uſed to denote a perſonal action, by which the plaintiff contends, that ſomething ought to be given to him; for denunciations are not in uſe.*

Condicere enim eſt.] "Condicere priſcâ lingua ſignificat denunciare; nam, qui olim cum aliquo litem habebat, denuntiabat ei, *ut illo die ad judicium accipiendum adeſſet.* Hodie vero per abuſionem condictio dicitur actio, quam actor intentans dicit; *ſi paret hunc dare oportere.* Nulla enim hoc tempore adverſario fit denuntiatio. *Theoph. h. t.*

Diviſio ſecunda.

§ XVI. Sequens illa diviſio eſt, quod quædam actiones rei perſequendæ gratia comparatæ ſunt, quædam pœnæ perſequendæ, quædam miſtæ ſunt.

§ 16. *Actions are alſo farther divided into thoſe, which are given, for the ſake of obtaining the very thing in diſpute; into thoſe, which are given, for the penalty only; and laſtly into mixed actions, which are given for the recovery both of the thing and the penalty.*

De actionibus rei persecutoriis.

§ XVII. Rei persequendæ causa comparatæ sunt omnes in rem actiones. Earum vero actionum, quæ in personam sunt, eæ quidem, quæ ex contractu nascuntur, fere omnes rei persequendæ causa comparatæ videntur: veluti quibus mutuam pecuniam, vel in stipulatum deductam, petit actor: item commodati, depositi, mandati, pro socio, ex empto, vendito, locato, conducto. Plane, si depositi agatur eo nomine, quod tumultus, incendii, ruinæ, naufragii causa depositum sit, in duplum actionem prætor reddit, si modo cum ipso, apud quem depositum sit, aut cum hærede ejus, de dolo ipsius agitur: quo casu mista est actio.

§ 17. *All real actions are given for the recovery of the thing in litigation; and almost all the personal actions, which arise from a contract, are also given for the recovery of the thing itself; as the action for a* mutuum, *a* commodatum, *or on account of a stipulation; also the action on account of a deposit, a mandate, partnership, buying and selling, letting and hiring. But, when a suit is commenced for a thing deposited by reason of a riot, a fire, or any other calamity, the prætor always gives an action for a double penalty, besides the thing deposited, if the suit is brought against the depositary himself, or against his heir, for fraud; in which case the action is mixed.*

De actionibus pœnæ persecutoriis.

§ XVIII. Ex maleficiis vero proditæ actiones, aliæ tantum pœnæ persequendæ causa comparatæ sunt: aliæ tam pœnæ, quam rei persequendæ; et ob id mistæ sunt. Pœnam tantum persequitur quis actione furti: sive enim manifesti agatur, quadrupli, sive non manifesti, dupli, de sola pœna agitur: nam ipsam rem propria actione persequitur quis, id est, suum esse petens, sive fur ipse eam rem possideat, sive alius quilibet. Eo amplius adversus furem etiam condictio est rei.

§ 18. *In cases of male-feazance, some actions are given for the penalty only, and some both for the thing and the penalty; and these are therefore called mixed actions. But, in an action of theft, whether manifest or not manifest, nothing more is sued for than the penalty, which, in manifest theft is quadruple, and, in theft not manifest, double: for the owner may recover by a separate action whatever hath been stolen from him, if he alleges, that the thing stolen is his own; and he is intitled to this action, not only against the thief, but against any other person, who is in possession of his property. The thief may also be sued by a condiction, or personal action, for the recovery of the thing stolen.*

De mixtis, hoc est, rei et pœnæ persecutoriis.

§ XIX. Vi autem bonorum raptorum actio mista est, quia in quadruplo rei persecutio continetur: pœna autem tripli est. Sed et legis Aquiliæ actio de damno injuria dato mista est: non solum si adversus infi-

inficiantem in duplum agatur, ſed interdum etſi in ſimplum quiſque agat; veluti ſi quis hominem claudum aut luſcum occiderit, qui in eo anno integer et magni pretii fuerit: tanti enim damnatur, quanti is homo eo in anno plurimi fuerit, ſecundum jam traditam diviſionem. Item miſta eſt actio contra eos, qui relicta ſacroſanctis Eccleſiis, vel aliis venerabilibus locis, legati vel fidei-commiſſi nomine, dare diſtulerint, uſque adeo ut etiam in judicium vocarentur. Tunc enim et ipſam rem vel pecuniam, quæ relicta eſt, dare compelluntur, et aliud tantum pro pœna: et ideo in duplum ejus fit condemnatio.

§ 19. *An action for goods taken by force is a mixed action; becauſe the value of whatever is taken is included under the quadruple value to be recovered by the action; and thus the penalty is but triple. The action, introduced by the law* Aquilia, *on account of damage injuriouſly done, is alſo a mixed action; not only when it is given for double value againſt a man denying the fact, but ſometimes, when the action is only for ſingle value; as when a man hath killed a ſlave, who at the time of his death was lame, or wanted an eye, but had within the year, previous to his deceaſe, been free from any defect, and of great price; for in this caſe the defendent is obliged to pay as much as the ſlave was worth at any time within the year preceding his death, according to what has already been obſerved. B. 4. t. 3. A mixed action may alſo be brought againſt thoſe, who have delayed to deliver a legacy, or gift in truſt, given for the benefit of a church, or any other holy place, till they have been called before a magiſtrate for that purpoſe, and then they are compelled to deliver up the thing, or to pay the money bequeathed, and alſo the value of as much more, by way of penalty; and thus they are condemned to pay the double of what was due.*

De mixtis, id eſt, tam in rem, quam in perſonam.

§ XX. Quædam actiones mixtam cauſam obtinere videntur, tam in rem, quam in perſonam: qualis eſt familiæ erciſcundæ actio, quæ competit cohæredibus de dividenda hæreditate: item communi dividundo, quæ inter eos redditur, inter quos aliquid commune eſt, ut id dividatur: item finium regundorum actio, qua inter eos agitur, qui confines agros habent. In quibus tribus judiciis permittitur judici rem alicui ex litigatoribus ex bono et æquo adjudicare; et, ſi unius pars prægravari videbitur, eum invicem certa pecunia alteri condemnare.

§ 20. *There are alſo ſome actions, which are of a mixed nature, by being, in effect, as well real as perſonal: of this ſort is the action* familiæ erciſcundæ, *which may be brought by coheirs for the partition of their inheritance: ſuch alſo is the action* de communi dividundo, *given for the diviſion of any parcel or thing or things, which, excluſive of an inheritance, are in common: and likewiſe the action* finium regundorum, *which takes place among thoſe, whoſe eſtates are contiguous. And, in theſe three actions, it is wholly in the power of the judge to give the ground, or thing in diſpute, to either of the parties litigant, and then to oblige that party, if neceſſity ſo requires, to recompenſe his adverſary, by paying him a ſum certain, in amends for any inequality in the adjudication.*

Familiæ erciſcundæ. The word *erciſcere* is or incloſure. *Cic. de orat. l. 1. Hein. Syntag.* made from the old verb *ercere*, or *hercere*, to *l.* 2. These are wits uſed in *England*, divide; which is derived from ἕρκος, an hedge, which anſwer all the purpoſes of the three actions

mentioned

mentioned in the text, *viz.* the writs *de partitione facienda — de rationalibus divisis — de perambulatione faciendâ — de curia claudenda — de reparatione faciendâ.*

For a particular account of these writs, the reader is refered to *Fitzherbert's natura brevium* in 4*to.* p. 142. 300. 309. 297. 295.

Divisio tertia.

§ XXI. Omnes autem actiones vel in simplum conceptæ sunt, vel in duplum, vel in triplum, vel in quadruplum: ulterius autem nulla actio extenditur.

§ 21 *All actions are for the single, double, triple, or quadruple value of the thing in litigation; for no action extends farther.*

Ulterius autem.] On some actions, nothing more is given by the law of *England*, than the bare damages sustained; as in actions of trespass; — but double and triple damages are given in many cases; and even ten-fold damages are recoverable against a juror, who receives a bribe for bringing a verdict. 38 *Edw* 3. *cap.* 12. *Cowel. h. l.*

De actionibus in simplum.

§ XXII. In simplum agitur, veluti ex stipulatione, ex mutui datione, ex empto, vendito, locato, conducto, mandato, et denique ex aliis quam plurimis causis.

§ 22. *The single value is sued for, when an action is given upon a stipulation, a loan, a mandate, the contract of buying and selling, letting and hiring; and also upon other very numerous accounts.*

In duplum.

§ XXIII. In duplum agimus, veluti furti nec manifesti, damni injuriæ ex lege Aquilia, depositi ex quibusdam causis: item servi corrupti, quæ competit in eum, cujus hortatu consiliove servus alienus fugerit, aut contumax adversus dominum factus est, aut luxuriose vivere cœperit, aut denique quolibet modo deterior factus sit: in qua actione earum etiam rerum, quas fugiendo servus abstulerit, æstimatio deducitur: item ex legato, quod venerabilibus locis relictum est, secundum ea, quæ supra diximus.

§ 23. *The double value is sued for, in an action of theft* not manifest, *of injury, by virtue of the law* Aquilia, *and sometimes in an action of deposite. The double value is likewise sued for, in an action brought, on account of a slave corrupted, against him, by whose advice such a slave hath fled from his master, grown disobedient, luxurious, or become in any manner the worse; and, in this action, an estimation is to be made of whatever things the slave hath stolen from his master, before his flight. An action for the detention of a legacy, left to an holy place, is also given for double the value, as we have before remarked.*

In triplum.

§ XXIV. Tripli vero agimus, cum quidam majorem vera æstimatione quantitatem in libello conventionis inserunt, ut ex hac causa viatores, id est, executores litium, ampliorem summam sportularum nomine

nomine exigerent: tunc enim id, quod propter eorum cauſam damnum paſſus fuerit reus, in triplum ab actore conſequetur; ut in hoc triplo etiam ſimplum, in quo damnum paſſus eſt, connumeretur. Quod noſtra conſtitutio introduxit, quæ in noſtro codice fulget, ex qua procul dubio certum eſt, ex lege condictitiam emanare.

§ 24. *A ſuit may be brought for triple value, when any perſon inſerts a greater ſum, than is due to him, in the libel of convention, to the intent, that the officers of any court may exact a larger fee, or ſportule, from the defendent: in which caſe the defendent may obtain the triple value of the extraordinary fee from the plaintiff, including the fee in the triple value. The fees of officers are regulated by our conſtitution, and it is not to be doubted, but that the action, called* condictio ex lege, *may be given by virtue of that ordinance.*

Noſtra conſtitutio.] not extant. *vid. Theoph. in hunc locum.*

In quadruplum.

§ XXV. Quadrupli autem agitur; veluti furti manifeſti; item de eo, quod metus cauſa factum ſit; deque ea pecunia, quæ in hoc data ſit, ut is, cui datur, calumniæ cauſa negotium alicui faceret, vel non faceret. Item ex lege condictitia, noſtra ex conſtitutione, oritur, in quadruplum condemnationem imponens iis executoribus litium, qui contra noſtræ conſtitutionis normam à reis quicquam exegerint.

§ 25. *A ſuit may be commenced for quadruple or fourfold value, by an action for theft manifeſt, by an action for putting a man in fear, and by an action on account of money, given to bring on a litigious ſuit againſt ſome third perſon, or on account of money given to deſiſt from it. A condiction* ex lege, *for the quadruple value, ariſes alſo from our conſtitution againſt all officers of courts of juſtice, who demand any thing from the party defendent, contrary to the regulations of the ſaid conſtitution.*

Subdiviſio actionum in duplum.

§ XXVI. Sed furti quidem nec manifeſti actio et ſervi corrupti à cæteris, de quibus ſimul locuti ſumus, eo differunt, quod hæ actiones omnimodo dupli ſunt: at iſtæ, (id eſt, damni injuriæ ex lege Aquilia et interdum depoſiti,) inficiatione duplicantur: in confitentem autem in ſimplum dantur. Sed illa, quæ de iis competit, quæ relicta venerabilibus locis ſunt, non ſolum inficiatione duplicatur, ſed etiamſi diſtulerit relicti ſolutionem, uſque quo juſſu magiſtratuum conveniatur. In confitentem vero, antequam juſſu magiſtratuum conveniatur, ſolvendi ſimpli redditur.

§ 26. *But an action of theft* not manifeſt, *and an action on account of a* ſlave corrupted, *differ from the others, of which we have ſpoken, in that they always inforce a condemnation in double the value: but in an action, given by the law* Aquilia *for an injury done, and ſometimes in an action of depoſite, the double value may be exacted in caſe of a denial; yet whenever the party defendent makes a confeſſion, then the ſingle value is all, which can be recovered. But, when a demand is made*

by an action for a legacy to pious uſes, due to any holy place or ſociety, the penalty is not only doubled by the denial of the defendent, but alſo by any delay of payment, which may be adjudged to have given a juſt cauſe for citing the defendent before a magiſtrate: but, if the legacy is confeſſed and paid, before any citation iſſues at the command of the judge, the party complainant muſt reſt ſatisfied with the ſingle value.

Subdiviſio actionum in quadruplum.

§ XXVII. Item actio de eo, quod metus cauſa factum ſit, à cæteris, de quibus ſimul locuti ſumus, eo differt, quod ejus natura tacite continetur, ut, qui judicis juſſu ipſam rem actori reſtituat, abſolvatur: quod in cæteris caſibus non eſt ita, ſed omnimodo quiſque in quadruplum condemnatur: quod eſt et in furti manifeſti actione.

§ 27. *An action for putting a man in fear differs alſo from other actions* in quadruplum, *becauſe it is tacitly implied in the nature of this action, that the party, who hath obeyed the command of the judge or magiſtrate, in reſtoring the things taken, may be diſmiſſed; for, in all other actions for the fourfold value, every man muſt be condemned to pay the full penalty, as in the action of theft manifeſt.*

Abſolvatur.] The commentators give no ſatisfaction, in regard to the reaſon of this practice.

Diviſio quarta de actionibus bonæ fidei.

§ XXVIII. Actionum autem quædam bonæ fidei ſunt, quædam ſtricti juris. Bonæ fidei ſunt hæ: ex empto, vendito; locato, conducto; negotiorùm geſtorum; mandati; depoſiti; pro ſocio; tutelæ; commodati; pignoratitia; familiæ eriſcundæ; communi dividundo; præſcriptis verbis, quæ de æſtimato proponitur; et ea, quæ ex permutatione competit; et hæreditatis petitio. Quamvis enim uſque adhuc incertum erat, inter bonæ fidei judicia connumeranda hæreditatis petitio eſſet, an non: noſtra tamen conſtitutio aperte, eam eſſe bonæ fidei, diſpoſuit.

§ 28. *The fourth diviſion of actions is into thoſe of good faith, and thoſe of ſtrict right. Thoſe of good faith are the following*; viz. *actions of buying and ſelling, letting and hiring; of affairs tranſacted, of mandate, depoſit, partenerſhip, tutelage, loan, mortgage; of the partition of an inheritance, and of the diviſion of any particular thing or things, which belong in common to diverſe perſons; alſo actions in preſcribed words, which are either eſtimatory, or derived from commutation; and laſtly that action, by virtue of which we demand an inheritance; for altho' it hath long been doubtful to what claſs this action belonged; yet it is now clearly determined by our conſtitution, that the demand of an inheritance is to be numbered among the actions of good faith.*

Actionum autem.] Altho' no ſuch diſtinction is made by *Engliſh* lawyers in their writings, yet they make it in practice: — for the damages, which are received from contracts and treſpaſſes, are always remited to the equity of jurors, and judgment is given according to their eſtimation. *Cowel h. l.*

Noſtra tamen conſtitutio.] *C.* 3. *t.* 31. *l.* 3.

De rei uxoriæ actione in ex ſtipulatu actionem transfuſa.

§ XXIX. Fuerat antea et rei uxoriæ actio una ex bonæ fidei judiciis: ſed cum, pleniorem eſſe ex ſtipulatu actionem invenientes, omne jus, quod res uxoria antea habebat, cum multis diviſionibus in actionem ex ſtipulatu, quæ de dotibus exigendis proponitur, tranſtulerimus, merito rei uxoriæ actione ſublata, ex ſtipulatu actio, quæ pro ea introducta eſt, naturam bonæ fidei judicii tantum in exactione dotis meruit, ut bonæ fidei ſit: ſed et tacitam ei dedimus hypothecam. Præferri autem aliis creditoribus in hypothecis tunc cenſuimus, cum ipſa mulier de dote ſua experiatur, cujus ſolius providentia hoc induximus.

§ 29. *The action, called* rei uxoriæ, *which was given for the recovery of a marriage portion, was formerly numbered among the actions of good faith; but when, upon finding the action of ſtipulation to be more full and advantageous, we abrogated the action* rei uxoriæ, *and transfered all it's effects, with the addition of many other powers, to the action of ſtipulation, which is given on account of marriage portions, we then not only thought, that this action of ſtipulation, as far as it related to marriage portions, deſerved to be numbered with actions of good faith, but we alſo added to it, by implication, the full powers of an action of hypotheque; and we have likewiſe judged it proper, that women, in whoſe ſole behalf we enacted our conſtitution, ſhould be prefered to all other creditors by mortgage, whenever they themſelves ſue for their marriage portions.*

Rei uxoriæ.] Soluto matrimonio dabatur uxori adverſus maritum rei uxoria actio ad repetendas res dotales. *Theoph.*

Hoc induximus.] Scilicet, conſtitutione; *Cod.* 5. *t.* 13.

De poteſtate judicis in judicio bonæ fidei, et de compenſationibus.

§ XXX. In bonæ fidei judiciis libera poteſtas permitti videtur judici ex bono et æquo æſtimandi, quantum actori reſtitui debeat. In quo et illud continetur, ut, ſi quid invicem præſtare actorem oporteat, eo compenſato, in reliquum is, cum quo actum eſt, debeat condemnari. Sed et in ſtricti juris judiciis ex reſcripto divi Marci, oppoſita doli mali exceptione, compenſatio inducebatur. Sed noſtra conſtitutio eaſdem compenſationes, quæ jure aperto nituntur, latius introduxit, ut actiones ipſo jure minuant, ſive in rem, ſive in perſonam, ſive alias quaſcunque; excepta ſola depoſiti actione, cui, aliquid compenſationis nomine opponi, ſane iniquum eſſe credimus: ne, ſub prætextu compenſationis, depoſitarum rerum quis ex actione defraudetur.

§ 30. *In all actions of good faith a full power is given to the judge of calculating, according to the rules of juſtice aud equity, how much ought to be reſtored to the plaintiff; and of courſe, when the plaintiff is found to be indebted to the defendent in a leſs ſum, it is in the power of the judge to allow a compenſation, and to condemn the defendent in the payment of the difference: and, even in actions of ſtrict right, the emperor* Marcus *introduced a compenſation by oppoſing an exception of fraud: but we have extended compenſations much farther by our conſtitution, when*

the debt of the defendent is evident; ſo that actions of ſtrict right, whether real, perſonal, or of whatever kind they are, may be diminiſhed by compenſation; except only an action of depoſit, againſt which we have not judged it proper to permit any compenſation to be alleged, leſt the pretence of compenſation ſhould give a color and incouragement to fraud.

Sed noſtra conſtitutio.] The conſtitution mentioned in this ſection may be found in the fourth book of the code; *t.* 31. *l.* 14.

In the court of *Chancery*, where it is an eſtabliſhed rule, that he, who would have equity, muſt do equity, the plaintiff, in a bill of account, has always been obliged to diſcount as much of his demand, as the defendent can prove to be due to him. But the common law does not allow of any ſtopage, or compenſation; from whence there aroſe great inconveniences, which at length gave riſe to the ſtatutes of the 2d and 8th of *George* the ſecond. By the 1ſt of which, it is enacted, "that "where there are mutual debts between the "plaintiff and defendent; or, if either party "ſue, or be ſued, as executor or adminiſtrator, "where there are mutual debts between the "teſtator or inteſtate and either party, one "debt may be ſet againſt the other; and ſuch "matter may be given in evidence upon the "general iſſue, or pleaded in bar, as the caſe "ſhall require, if, at the time of pleading the "general iſſue, notice be given of the particular ſum or debt intended to be inſiſted upon. "2 *Geo.* 2. *cap.* 22." And, by the ſecond of theſe ſtatutes, it is declared, "that mutual "debts may be ſet againſt each other, either "by being pleaded, or on the general iſſue, "notwithſtanding ſuch debts are of a different "nature, unleſs where either of the debts ſhall "accrue by a penalty contained in a bond or "ſpecialty. And in all ſuch caſes the debt intended to be ſet off ſhall be pleaded in bar, "in which plea ſhall be ſhewn how much is "juſtly due on either ſide, and in caſe the "plaintiff recovers, then judgment ſhall be "entered for no more, than ſhall appear to be "juſtly due, after one debt is ſet againſt another." 8 *Geo.* 2. *cap.* 24. § 5.

De actionibus arbitrariis.

§ XXXI. Præterea actiones quaſdam arbitrarias, id eſt, ex arbitrio judicis pendentes, appellamus: in quibus niſi arbitrio judicis is, cum quo agitur, actori ſatisfaciat, veluti rem reſtituat, vel exhibeat, vel ſolvat, vel ex noxali cauſa ſervum dedat, condemnari debeat. Sed iſtæ actiones tam in rem, quam in perſonam, inveniuntur. In rem; veluti Publiciana, Serviana de rebus coloni, quaſi Serviana, quæ etiam hypothecaria vocatur: in perſonam; veluti quibus de eo agitur, quod vi aut metus cauſa, aut dolo malo, factum eſt. Item cum id, quod certo loco promiſſum eſt, petitur. Ad exhibendum quoque actio ex arbitrio judicis pendet. In his enim actionibus, et cæteris ſimilibus, permittitur judici ex bono et æquo, ſecundum cujuſque rei, de qua actum eſt, naturam, æſtimare, quemadmodum actori ſatisfieri oporteat.

§ 31. *There are alſo ſome actions, which we call arbitrary, becauſe they depend intirely upon the arbitration of the judge; for, in theſe, if the party does not obey the legal commands of the court, by exhibiting whatever is required, by reſtoring the thing in litigation, or by paying the value of it, or by giving up a ſlave in conſequence of an action of male-feazance, the judge ought immediately to proceed to condemnation by his definitive ſentence. Of theſe arbitrary actions ſome are real and ſome perſonal: ſome are real, as the action* Publiciana, Serviana, *and* quaſi-Serviana, *which is likewiſe called hypothecary: others are perſonal, as thoſe, by which a ſuit is commenced on account of ſomething done by force, fear, or fraud: or on account of ſomething, which was promiſed to be paid or reſtored in a certain place: and the action* ad exhibendum, *which was given to the intent, that ſomething particular ſhould be exhibited, is alſo of*

of the ſame kind: and, in all theſe and the like actions, the judge has full power to determine, according to equity and the nature of the thing ſued for, in what manner and proportion the plaintiff ought to receive ſatisfaction.

Actiones arbitrarias.] The laws of *England* take no notice of arbitrary actions, or actions of good faith; but the Lord Chancellor, to whoſe equity every one, who is without remedy at common law, may appeal, is not bound down or circumſcribed by any rules of ſtrict law, but may decide a cauſe, properly brought before him, *juxta boni viri arbitrium*, i.e. according to the judgment and conſcience of a good man. And he may incarcerate any party, who is contumacious, or refractory to his decrees, and detain him in durance, till he ſubmits himſelf to the orders of the court.

Quinta diviſio, de incertæ quantitatis petitione.

§ XXXII. Curare autem debet judex, ut omnino, quantum poſſibile ei ſit, certæ pecuniæ vel rei ſententiam ferat; etiamſi de incerta quantitate apud eum actum eſt.

§ 32. *A judge ought always to take as much care as poſſible ſo to frame his ſentence, that it may be given for a thing or ſum certain; altho' the claim, upon which the ſentence is founded, may be for an incertain ſum or quantity.*

De pluris petitione.

§ XXXIII. Si quis agens intentione ſua plus complexus fuerit, quam ad eum pertineat, cauſa cadebat, id eſt, rem amittebat; nec facile in integrum reſtituebatur à prætore, niſi minor erat 25 annis: huic enim, ſicut in aliis cauſis, cauſa cognita ſuccurrebatur, ſi lapſus juventute fuerat: ita et in hac cauſa ſuccurri ſolitum erat. Sane, ſi tam magna cauſa juſti erroris interveniebat, ut etiam conſtantiſſimus quiſque labi poſſet, etiam majori 25 annis ſuccurrebatur; veluti ſi quis totum legatum petierit, poſt deinde prolati fuerint codicilli, quibus aut pars legati adempta ſit, aut quibuſdam aliis legata data ſint; quæ efficiebant, ut plus petiiſſe videretur petitor, quam dodrantem; atque ideo lege Falcidia legata minuebantur. Plus autem quatuor modis petitur, re, tempore, loco, et cauſa. Re, veluti ſi quis pro decem aureis, quæ ei debebantur, viginti petierit; aut ſi is, cujus ex parte res eſt, totam eam, vel majorem partem, ſuam eſſe intenderit. Tempore, veluti ſi quis ante diem vel ante conditionem petierit. Qua enim ratione qui tardius ſolvit, quam ſolvere deberet, minus ſolvere intelligitur, eadem ratione, qui præmature petit, plus petere videtur. Loco plus petitur, veluti cum quis id, quod certo loco ſibi dari ſtipulatus eſt, alio loco petit ſine commemoratione illius loci, in quo ſibi dari ſtipulatus eſt: verbi gratia, ſi is, qui ita ſtipulatus fuerit, *Epheſi dari ſpondes?* Romæ pure intendat, ſibi dari oportere. Ideo autem plus petere intelligitur, quia utilitatem, quam haberet promiſſor, ſi Epheſi ſolveret, adimit ei pura intentione: propter quam cauſam alio loco petenti arbitraria actio proponitur; in qua ſcilicet ratio habetur utilitatis, quæ promiſſori competitura fuiſſet, ſi illo loco ſolveret, quo ſe ſoluturum ſpoſpondit. Quæ

utilitas

utilitas plerumque in mercibus maxima invenitur; veluti vino, oleo, frumento, quæ per ſingulas regiones diverſa habent pretia. Sed et pecuniæ numeratæ non in omnibus regionibus ſub iiſdem uſuris fœnerantur. Si quis tamen Epheſi petat, id eſt, eo loco petat, in quo, ut ſibi detur, ſtipulatus eſt, pura actione recte agit: idque etiam prætor demonſtrat, ſcilicet quia utilitas ſolvendi ſalva eſt promiſſori. Huic autem, qui loco plus petere intelligitur, proximus eſt, qui cauſa plus petit: ut ecce, ſi quis ita à te ſtipuletur, *hominem Stichum, aut decem aureos, dare ſpondes?* deinde alterum petat, veluti hominem tantum, aut decem aureos tantum. Ideo autem plus petere intelligitur, quia in eo genere ſtipulationis promiſſoris eſt electio, utrum pecuniam, an hominem, ſolvere malit: qui igitur pecuniam tantum, vel hominem tantum, ſibi dari oportere intendit, eripit electionem adverſario, et eo modo ſuam quidem conditionem meliorem facit, adverſarii vero ſui deteriorem. Qua de cauſa talis in ea re prodita eſt actio, ut quis intendat hominem Stichum aut aureos decem ſibid are oportere, id eſt, ut eodem modo peteret, quo ſtipulatus eſt. Præterea, ſi quis generaliter hominem ſtipulatus ſit, et ſpecialiter Stichum petat; aut generaliter vinum ſtipulatus ſit, et ſpecialiter campanum petat; aut generaliter purpuram ſtipulatus ſit, deinde ſpecialiter Tyriam petat; plus petere intelligitur, quia electionem adverſario tollit, cui ſtipulationis jure liberum fuit, aliud ſolvere, quam quod peteretur. Quinetiam licet viliſſimum ſit, quod quis petat; nihilhominus plus petere intelligitur: quia ſæpe accidit, ut promiſſori facilius ſit illud ſolvere, quod majoris pretii eſt. Sed hæc quidem antea in uſu fuerant; poſtea vero lex Zenoniana, et noſtra, rem coarctavit. Et, ſi quidem tempore plus fuerit petitum, quid ſtatui oporteat, Zenonis divæ memoriæ loquitur conſtitutio. Sin autem quantitate, vel alio modo, plus fuerit petitum, id omne, ſi quod forte damnum ex hac cauſa accideret ei, contra quem plus petitum fuerit, commiſſa tripli condemnatione, ſicut ſupra diximus, puniatur.

§ 33. *Formerly, if a plaintiff claimed more in his libel, than was due or belonged to him, he failed in his cauſe; that is, he even loſt that, which really did belong to him: nor was it eaſy for him to be reſtored to it by the prætor, unleſs he was under the age of 25 years: for in this, as well as in other caſes, it was uſual to aid minors, if it appeared upon examination, that the error was owing to their youth; and whenever an error was ſuch, that one of the moſt knowing of men might have been led into it, then even perſons of full age might have been aided by the magiſtrate: as for example, if a legatee had demanded his whole legacy, and codicils were afterwards produced, by which a part of it was revoked, or new legacies bequeathed to other perſons, ſo that the plaintiff appeared to have demanded more than three fourths of his legacy; becauſe it was ſubject to a diminution by the law* Falcidia; *yet, in ſuch a caſe, the legatee would be relieved, notwithſtanding the excels of his demand. It is here neceſſary to be obſerved, that a man may demand more than what is due to him in four ſeveral reſpects,* viz. *in reſpect to the thing itſelf; to time; to place; and to the*

the cauſe. In reſpect to the thing itſelf; as when the plaintiff, inſtead of ten aurei, *which are due to him, demands twenty: or if, when he is, in reality, the owner but of part of ſome particular thing, he claims the whole as his own, or a greater ſhare of it than he is intituled to. In reſpect to time, as when the plaintiff makes his demand before the day of payment, or before the time of the performance of a condition; for, as he, who does not pay ſo ſoon as he ought, is always underſtood to pay leſs than he ought, ſo, by a parity of reaſoning, whoever commences a ſuit prematurely, demands more than his due. In reſpect to place; as when any perſon requires, that what was ſtipulated to be given, or delivered to him at a certain place, ſhould be given or delivered to him at ſome other place, without taking any notice in his libel of the place ſpecified in the ſtipulation; as if* Titius, *for example, ſhould ſtipulate in theſe words:* do you promiſe to give ſuch a particular thing at *Epheſus? and ſhould afterwards declare ſimply in his libel, that the ſame thing ought to be given to him at* Rome: *for* Titius *would thus be underſtood to demand more than his due, by indeavoring to deprive his debtor of the advantage, which he might have had in paying his creditor at* Epheſus. *And, it is upon this account, that an arbitrary action is given to him, who would demand payment in another place than that, which was agreed upon; for, in that action, the advantage, which might have accrued to the debtor, by paying his debt in the place ſtipulated, is always taken into conſideration at the diſcretion of the judge. This advantage is generally found the greateſt in merchandiſe: as in wine, oil, corn,* &c. *which, in different places, bear different prices; and, indeed, money itſelf is not lent every where at the ſame intereſt. But, if a man would ſue the performance of a ſtipulation at* Epheſus, *or at any other place, where it was agreed, that the ſtipulation ſhould be performed, he may legally commence his ſuit by a pure action, that is, without mentioning the place; and this the prætor allows of, inaſmuch as the debtor does not loſe any advantage. Next to him, who demands more than his due, in regard to place, is he, who demands more than his due, in regard to the cauſe: as for inſtance, if* Titius *ſtipulates thus with* Sempronius; --- do you promiſe to give either your ſlave *Stichus* or ten aurei? *and then demands from* Sempronius, *either the ſlave ſpecially, or the money ſpecially: for in this caſe* Titius *would be adjudged to have demanded more than his due, the right of election being in* Sempronius, *by whom the promiſe was made; and therefore, when* Titius *ſues either for the money ſpecially, or for the ſlave, he deprives the adverſe party of the power of election, and betters his own condition, by making that of his adverſary the worſe: and it is upon this account, that an action has been given, by which the party agent may make his demand conformable to the ſtipulation, and claim either the ſlave, or the money. And farther, if a man ſhould ſtipulate generally, that wine, purple, or a ſlave, ſhould be given him, and ſhould afterwards ſue for the wine of* Campania, *the purple of* Tyre, *or the ſlave* Stichus *in particular, he would then be adjudged to have demanded more than his due; for the power of election would thus be taken from the adverſe party, who was not bound by the ſtipulation to pay the thing demanded; and altho', in any of theſe caſes, the thing ſued for ſhould be of little or no value, yet the demandant would be thought to claim more than his due; becauſe it is often eaſier for the debtor to pay the thing ſtipulated, altho' it may be of greater value than the thing demanded.——Such was the law according to the antient practice, in regard to an over-demand,* viz. *that the demandant ſhould loſe even that, which was really due to him. But this law has been greatly reſtrained by the conſtitution of* Zeno *the emperor, and by our own; for, if more than is due is demanded in regard to time, the judge muſt be directed in his proceeding by the conſtitution of*

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that emperor of glorious memory; but, if more is demanded, in reſpect to quantity, or on any other account, then the loſs ſuffered by him, upon whom the demand is made, muſt be recompenſed, as we have before declared, by the condemnation of the party agent in triple damages.

Lege Falcidia.] See book the ſecond, title the twenty-ſecond.

Lex Zenoniana et noſtra.] The conſtitutions of *Zeno* and *Juſtinian*, refered to in the text, are not extant,

De minoris ſummæ petitione.

§ XXXIV. Si minus intentione ſua complexus fuerit actor, quam ad eum pertineat; veluti ſi, cum ei decem aurei deberentur, quinque ſibi dare oportere intenderit; aut ſi, cum totus fundus ejus eſſet, partem dimidiam ſuam eſſe petierit; ſine periculo agit: in reliquum enim nihilominus judex adverſarium eodem judicio ei condemnat, ex conſtitutione divæ memoriæ Zenonis.

§ 34. *If a plaintiff ſues for leſs, than what he has a claim to, demanding, for inſtance, only* 5 aurei, *when ten are due; or the moiety of an eſtate, when the whole belongs to him; he acts ſafely by this method; for the judge, in conſequence of* Zeno's *conſtitution, may nevertheleſs condemn the adverſe party, under the ſame proceſs, to the payment or delivery of all, which appears of right to belong to the plaintiff.*

Si aliud pro alio petatur.

§ XXXV. Si quis aliud pro alio intenderit, nihil eum periclitari placet, ſed in eodem judicio, cognita veritate, errorem ſuum corrigere ei permittitur; veluti ſi is, qui hominem ſtichum petere deberet, Erotem petierit: aut ſi quis ex teſtamento dari ſibi oportere intenderit, quod ex ſtipulatu debetur.

§ 35. *When a plaintiff demands one thing inſtead of another, he riſks nothing by the miſtake, which he is allowed to correct under one and the ſame proceſs: as if a litigant ſhould demand the ſlave* Erotes, *inſtead of the ſlave* Stichus, *or ſhould claim, as due by teſtament, what is found to be due upon a ſtipulation.*

Diviſio ſexta. De peculio.

§ XXXVI. Sunt præterea quædam actiones, quibus non ſemper ſolidum, quod nobis debetur, perſequimur, ſed modo ſolidum perſequimur, modo minus: ut ecce, ſi in peculium filii ſervive agamus: nam, ſi non minus in peculio ſit, quam perſequimur, in ſolidum dominus paterve condemnatur: ſi vero minus inveniatur, eatenus condemnat judex, quatenus in peculio ſit. Quemadmodum autem peculium intelligi debeat, ſuo ordine proponemus.

§ 36. *There are alſo ſome actions, by which we do not always ſue for the whole, which is due to us; but for the whole, or leſs, than the whole, as it proves to be moſt expedient; thus, when a ſuit is brought againſt the* peculium *of a ſon or a ſlave, if the* peculium *is ſufficient to anſwer the demand, the father or maſter muſt be condemned to pay the whole debt; but, if the* peculium *is not ſufficient, the judge*

can

can condemn the defendents only to the extent of its value. We will hereafter explain, in it's proper place, what we mean by the term peculium.

De repetitione dotis.

§ XXXVII. Item, ſi de dote in judicio mulier agat, placet, eatenus maritum condemnari debere, quatenus facere poſſit, id eſt, quatenus facultates ejus patiuntur. Itaque, ſi dotis quantitati concurrant facultates ejus, in ſolidum damnatur, ſin minus, in tantum, quantum facere poteſt. Propter retentionem quoque dotis repetitio minuitur: nam ob impenſas, in res dotales factas, marito quaſi retentio conceſſa eſt; quia ipſo jure neceſſariis ſumptibus dos minuitur, ſicut ex latioribus digeſtorum libris cognoſcere licet.

§ 37. *Alſo, if a woman commences a ſuit for the reſtitution of her marriage portion, the man muſt be condemned to pay as far as he is able*; i. e. *as far as his income or faculties will permit: and therefore, if the portion demanded and the faculties of the man are equal, he muſt be adjudged to ſatisfy the whole demand; but, if his faculties are leſs than the claim, he muſt nevertheleſs be condemned to pay as much as he is able. But the claim of a woman may in this caſe be leſſened by a retention; for the huſband is permited to retain an equivalent for whatever he hath neceſſarily expended upon the eſtate given with his wife, as a marriage portion; but this will fully appear by a peruſal of the digeſts, to which the reader is refered.*

De actione adverſus parentem, patronum, ſocium, et donatorem.

§ XXXVIII. Sed et, ſi quis cum parente ſuo patronove agat, item ſi ſocius cum ſocio judicio ſocietatis agat, non plus actor conſequitur, quam adverſarius ejus facere poteſt. Idem eſt, ſi quis ex donatione ſua conveniatur.

§ 38. *And, if any perſon commences a ſuit againſt his parent or patron, or if one partner ſues another, the plaintiff can by no means obtain ſentence for a greater ſum, than his adverſary is able to pay: and the ſame is to be obſerved, when a doner is ſued on account of his donation.*

De compenſationibus.

§ XXXIX. Compenſationes quoque oppoſitæ plerumque efficiunt, ut minus quiſque conſequatur, quam ei debeatur. Nam ex bono et æquo habita ratione ejus, quod invicem actorem ex eadem cauſa præſtare oportet, poterit judex in reliquum eum, cum quo actum eſt, condemnare, ſicut jam dictum eſt.

§ 39. *When a compenſation is alleged by the defendent, it generally happens, that the plaintiff recovers leſs than his demand; for it is in the power of the judge, as we have before declared, to make an equitable deduction from the demand of the plaintiff of whatever he owes to the defendent, and to condemn the defendent to the payment only of the remainder.*

De eo, qui bonis ceſſit.

§ XL. Cum eo quoque, qui creditoribus ſuis bonis ceſſit, ſi poſtea aliquid acquiſierit, quod idoneum emolumentum habeat, ex integro in id, quod facere poteſt, creditores experiuntur. Inhumanum enim erat, ſpoliatum fortunis ſuis in ſolidum damnari.

§ 40. *Creditors alſo, to whom a debtor hath made a ceſſion of his goods, may afterwards, if he hath gained any conſiderable acquiſition, bring a freſh ſuit againſt him, for as much as he is able to pay, but not more; for it would be inhuman to condemn a man* in ſolidum, *who hath already been deprived of his whole fortune.*

Si poſtea aliquid acquiſierit.] The ſtatute law of *England* in regard to bankrupts and inſolvent debtors, who have been diſcharged, is much of the ſame tenor with the *Roman* law: for it is enacted, by the 5th of *Geo.* 2d, "that "in caſe any commiſſion of bankruptcy ſhall "iſſue againſt any perſon, who after *June* "1732. ſhall have been diſcharged by virtue "of this act, or ſhall have compounded with "his creditors, or delivered to them his effects, "and been releaſed by them, or been diſ- "charged by any act for the relief of inſolv- "ent debtors, then the *body only* of ſuch per- "ſon conforming ſhall be free from arreſt; but "his future eſtate ſhall be liable to his credi- "tors [the tools of trade, neceſſary houſhold- "goods, and neceſſary wearing apparel of "ſuch bankrupt and his wife and children "excepted] unleſs the eſtate of ſuch perſon "ſhall produce clear fiveteen ſhillings in the "pound. 5 *Geo.* 2. *cap.* 3. § 9.

TITULUS SEPTIMUS.

Quod cum eo, qui in aliena poteſtate eſt, negotium geſtum eſſe dicitur.

D. xiv. T. 5. C. iv. T. 16.

Scopus et nexus.

QUIA tamen ſuperius mentionem habuimus de actione, qua in peculium filiorum ſervorumque agitur, opus eſt, ut de hac actione et de cæteris, quæ eorundem nomine in parentes dominoſve dari ſolent, diligentius admoneamus. Et quia, ſive cum ſervis negotium geſtum ſit, ſive cum iis, qui in poteſtate parentum ſunt, eadem fere jura ſervantur, ne verboſa fiat diſputatio, dirigamus ſermonem in perſonam ſervi dominique, idem intellecturi de liberis quoque et parentibus, quorum in poteſtate ſunt. Nam, ſi quid in his proprie ſervetur, ſeparatim oſtendemus.

We have already made mention of the action, by which a ſuit may be brought againſt the peculium, *or ſeparate eſtate of a ſon or a ſlave; but it is now neceſſary to ſpeak of it more fully, and alſo of ſome other actions, which are given on account of children*

children and ſlaves againſt their parents and maſters. But, inaſmuch as the law is almoſt the ſame, whether an affair is tranſacted with a ſlave, or with him, who is under the power of his parent, we will therefore, to avoid being prolix, treat only of ſlaves and their maſters, leaving what we ſay of them to be underſtood alſo of parents and children under power; for, whenever there is any thing peculiar to be obſerved, in regard to children and parents, we intend to point it out ſeparately.

De actione quod juſſu.

§ I. Si igitur juſſu domini cum ſervo negotium geſtum erit, in ſolidum prætor adverſus dominum actionem pollicetur: ſcilicet quia is, qui ita contrahit, fidem domini ſequi videtur.

§ 1. *If any buſineſs is negotiated by a ſlave, who acts by the command of his maſter, the prætor will give an action againſt the maſter for the whole value of the tranſaction; for whoever makes a contract with a ſlave, is preſumed to have done it upon a confidence in the maſter.*

Si igitur juſſu domini.] In general by the law of *England*, if a ſervant borrows money in his maſter's name, the maſter ſhall not be charged with it, unleſs it comes to his uſe, and that by his aſſent. And the law is the ſame, if a ſervant makes a contract in his maſter's name; for the contract ſhall not bind his maſter, unleſs it were by his maſter's command, or came to his maſter's uſe by his aſſent. *Doctor and Student, dial.* 2. *cap.* 42. But in ſome caſes the law will preſume the conſent of the maſter, altho' it is not particularly expreſſed, as in thoſe contracts, which are made by ſervants, whom merchants place in their ſhops or warehouſes, as their factors. *Cowel's inſt. lib.* 4. *t.* 7.

De exercitoria et inſtitoria actione.

§ II. Eadem ratione prætor duas alias in ſolidum actiones pollicetur; quarum altera exercitoria, altera inſtitoria, appellatur. Exercitoria tunc habet locum, cum quis ſervum ſuum magiſtrum navi præpoſuerit, et quid cum eo, ejus rei gratia, cui præpoſitus erit, contractum fuerit. Ideo autem exercitoria vocatur, quia exercitor is appellatur, ad quem quotidianus navis quæſtus pertinet. Inſtitoria tunc locum habet, cum quis tabernæ forte, aut cuilibet negotiationi, ſervum ſuum præpoſuerit, et quid cum eo, ejus rei cauſa, cui præpoſitus erit, contractum fuerit. Ideo autem inſtitoria appellatur; quia, qui negotiationibus præponuntur, inſtitores vocantur. Itas tamen duas actiones prætor reddit, et ſi liberum quis hominem, aut alienum ſervum, navi aut tabernæ aut cuilibet negotiationi præpoſuerit; ſcilicet quia eadem æquitatis ratio etiam eo caſu interveniat.

§ 2. *The prætor alſo gives two other actions* in ſolidum *upon the ſame motive; the one of which is called* exercitoria, *the other* inſtitoria. *The action* exercitoria *takes place, when a maſter hath conſtituted his ſlave to be the commander of a veſſel, and ſome contract hath been entered into with ſuch ſlave merely upon that account; and this action is named* exercitoria, *becauſe he, to whom the profits of a ſhip or veſſel appertain, is called* exercitor. *The action* inſtitoria *is made uſe of, when a maſter hath given his ſlave the management of a ſhop, or commited any particular affair to his direction, by which ſome one hath been induced to enter into a contract*

with ſuch ſlave: and this action is called inſtitoria, *becauſe all perſons, to whom a negotiation is commited, are denominated* inſtitores. *The prætor hath likewiſe been induced, by the ſame equity, to give theſe two actions againſt any man, who imploys a free perſon, or the ſlave of another, in the management of a ſhip, a warehouſe, or any particular affair.*

De tributoria.

§ III. Introduxit et aliam actionem prætor, quæ tributoria vocatur: namque ſi ſervus in peculiari merce, ſciente domino, negotietur, et quid cum eo ejus rei cauſa contractum erit, ita prætor jus dicit, ut, quicquid in his mercibus erit, quodque inde receptum erit, id inter dominum, ſi quid ei debebitur, et cæteros creditores, pro rata portione diſtribuatur. Et ideo tributoria vocatur, quia ipſi domino diſtributionem prætor permittit. Nam, ſi quis ex creditoribus queratur, quaſi minus ei tributum ſit, quam oportuerit, hanc ei actionem accommodat, quæ tributoria appellatur.

§ 3. *The prætor hath alſo introduced another action called* tributoria, *or tributory; for, if a ſlave, without the command, but with the knowledge of his maſter, trafics with the product of his* peculium, *and perſons are thus induced to contract with him, the prætor ordains, that the merchandize, or money, ariſing from his traffic, ſhall be diſtributed between the maſter, (if he has any juſt claim,) and the reſt of the creditors in a ratable proportion; and the maſter himſelf is always permited to make the diſtribution: but, if any creditor complains, that too ſmall a ſhare hath been apportioned to him, the prætor will allow him to uſe the before-named action, which is called* tributoria, *on account of the diſtribution.*

De peculio, et de in rem verſo.

§ IV. Præterea introducta eſt actio de peculio, deque eo, quod in rem domini verſum erit; ut quamvis ſine voluntate domini negotium geſtum erit, tamen ſive quid in rem ejus verſum fuerit, id totum præſtare debeat; ſive quid non ſit in rem ejus verſum, id eatenus præſtare debeat, quatenus peculium patitur. In rem autem domini verſum intelligitur, quicquid neceſſario in rem ejus impenderit ſervus, veluti ſi mutuatus pecuniam creditoribus ejus ſolverit, aut ædificia ruentia fulſerit, aut familiæ frumentum emerit, vel etiam fundum aut quamlibet aliam rem neceſſariam mercatus erit. Itaque, ſi ex decem puta aureis, quos ſervus tuus à Titio mutuo accepit, creditori tuo quinque aureos ſolverit, reliquos vero quinque quolibet modo conſumpſerit, pro quinque quidem in ſolidum damnari debes; pro cæteris vero quinque eatenus, quatenus in peculio ſit. Ex quo ſcilicet apparet, ſi toti decem aurei in rem tuam verſi fuerint, totos decem aureos Titium conſequi poſſe. Licet enim una ſit actio, qua de peculio, deque eo, quod in rem domini verſum ſit, agitur; tamen duas habet condemnationes. Itaque judex, apud quem de ea actione agitur, ante diſpicere ſolet, an in rem domini verſum ſit:

ſit: nec aliter ad peculii æſtimationem tranſit, quam aut nihil in rem domini verſum intelligatur, aut non totum. Cum autem quæritur, quantum in peculio ſit, ante deducitur, quicquid ſervus domino eive, qui in poteſtate ejus ſit, debet; et, quod ſupereſt, id ſolum peculium intelligitur. Aliquando tamen id, quod ei debet ſervus, qui in poteſtate domini ſit, non deducitur ex peculio, veluti ſi is in ipſius peculio ſit: quod eo pertinet, ut, ſi quid vicario ſuo ſervus debeat, id ex peculio ejus non deducatur.

§ 4. *The action concerning a* peculium, *and things converted to the profit of the maſter of a ſlave, hath likewiſe been introduced by the prætor; for altho' a contract hath been entered into by a ſlave, without the conſent of his maſter, yet, where the money ariſing from it is converted to the benefit of ſuch maſter, the maſter ought to be anſwerable for the performance of it; and, even altho' the maſter ſhould receive no emolument from the tranſaction, yet it is right, that he ſhould be anſwerable for as much as the* peculium *of his ſlave is found to be worth. But, to be more explicit, we underſtand, that whenever money, or any other thing, is neceſſarily uſed or expended by a ſlave upon his maſter's affairs, it is a converſion of it to his benefit; as for example, if a ſlave, who hath borrowed money, ſhould pay the debts of his maſter, repair his buildings, purchaſe an eſtate, proviſion, or any other thing, which is uſeful: and therefore, if out of ten* aurei, *borrowed by a ſlave, he ſhould pay only five to his maſter's creditors, and ſquander the reſt, the maſter would nevertheleſs be condemned to the payment* in ſolidum *of the five* aurei, *which had been expended for his uſe; but, as to the other five, he could be obliged to pay only ſo much as the* peculium *could anſwer; and from hence it will appear, that, if all the ten* aurei, *which were borrowed, had been converted by the ſlave to his maſter's emolument, the lender might have recovered the whole ten from the maſter; for altho' it is one and the ſame action, by which a ſuit is commenced againſt a* peculium, *and for the recovery of what a ſlave hath converted to his maſter's uſe, yet this action carries with it two different condemnations; and it is for this reaſon, that the judge does not begin to make an eſtimate of the value of the* peculium, *till he has previouſly examined, whether the whole, or any part of the money, ariſing from the ſlave's contract, hath been expended for the ſervice of the maſter: but, when the judge proceeds to the valuation of the* peculium, *a deduction is made of whatever the ſlave owes to his maſter, or to any other under the power of his maſter, and the remainder only is underſtood to be ſtrictly the* peculium, *and chargeable with debts due to ſtrangers. But it ſometimes happens, that what one ſlave owes to another, under the power of the ſame maſter, is not deducted; as when the ſlave, who is the creditor, compoſes a part of his debtor's* peculium; *for, if a ſlave is indebted to his vicarial ſlave, this debt cannot be deducted from the* peculium.

Aliquando tamen.] When an action *de peculio* is brought for the full value of a *peculium*, which is worth, for example, an hundred *aurei*, and the ſlave, to whom the *peculium* belongs, owes 50 *aurei* to the ſon of his maſter, or to ſome other ſlave under the power of the ſame maſter, the judge muſt then deduct thoſe fifty *aurei*; ſo that the plaintiff can can only receive the remaining fifty. But, when a ſuit is commenced for 100 *aurei* againſt a *peculium*, which is worth but 100 *aurei*, and the ſlave, to whom this *peculium*, or ſeparate eſtate, belongs, is indebted in 50 *aurei* to another ſlave, who is under the ſame maſter, but yet makes a part or parcel of the *peculium*, by being appendent to it, in this caſe the judge is not authoriſed to order the 50 *aurei*, due to this vicarial or ſubordinate ſlave, to be deducted, but muſt cauſe the payment of the 100 *aurei*, i. e. the whole value of the *peculium*, to be made to

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the plaintiff: and the reaſon, aſſigned for this by *Theophilus*, is the following: *et, cum ita ſe res habeat, non poteſt vicarius, cujus æſtimatione peculium augetur, et ipſe illud minuere, eo nomine, quod ſibi aliquid debeatur; ne eadem perſona duas contrarias habere functiones videatur, ut ſimul et augeat et minuat peculium. h. t.*

De concurſu dictarum actionum.

§ V. Cæterum dubium non eſt, quin is quoque, qui juſſu domini contraxerit, cuique inſtitoria vel exercitoria actio competit, de peculio deque eo, quod in rem domini verſum eſt, agere poſſit. Sed erit ſtultiſſimus, ſi, omiſſa actione, qua facillime ſolidum ex contractu conſequi poſſit, ſe ad difficultatem perducat probandi, in rem domini verſum eſſe, vel habere ſervum peculium, et tantum habere, ut ſolidum ſibi ſolvi poſſit. Is quoque, cui tributoria actio competit, æque de peculio et de in rem verſo agere poteſt. Sed ſane huic modo tributoria expedit agere, modo de peculio, et de in rem verſo. Tributoria ideo expedit agere, quia in ea domini conditio præcipua non eſt; id eſt, quod domino debetur, non deducitur, ſed ejuſdem juris eſt dominus, cujus et cæteri creditores: at, in actione de peculio, ante deducitur, quod domino debetur: et in id, quod reliquum eſt, creditori dominus condemnatur. Rurſus de peculio ideo expedit agere, quod in hac actione totius peculii ratio habetur: at in tributoria ejus tantum, quo negotiatur: et poteſt quiſque tertia forte parte peculii, aut quarta, vel etiam minima, negotiari, majorem autem partem in prædiis aut fœnebri pecunia habere. Prout ergo expedit, ita quiſque vel hanc actionem, vel illam, eligere debet. Certe, qui poteſt probare, in rem domini verſum eſſe, de in rem verſo agere debet.

§ 5. *It is nevertheleſs not to be doubted, but that he, who hath made a contract with a ſlave at the command of the maſter of that ſlave, and is intituled either to the action* inſtitoria *or* exercitoria, *is alſo intituled to the action* de peculio *and* de in rem verſo: *but it would be highly imprudent in any party to relinquiſh an action, by which he could moſt eaſily recover his whole demand, and, by recurring to another, reduce himſelf to the difficulty of proving, that the money he lent to the ſlave was turned to the uſe of the maſter, or that the ſlave is poſſeſſed of a* peculium *ſufficient to anſwer the whole debt. He alſo, to whom the action* tributoria *is given, is equally intituled to the action* de peculio, *and* de in rem verſo; *but it is expedient, in ſome caſes, to uſe the one, and in ſome caſes the other: yet it is frequently moſt expedient to uſe the action* tributoria; *becauſe, in this, the condition of the maſter is not principally regarded*; i. e. *there is no previous deduction made of what is due to him, his title being eſteemed in the ſame light with that of other creditors: but, in the action* de peculio, *the debt due to the maſter is firſt deducted, and he is condemned only to diſtribute the remainder among the creditors. Again, in ſome caſes, it may be more convenient to commence a ſuit by the action* de peculio, *becauſe it affects the whole* peculium, *whereas the action* tributoria *regards only ſo much of it as hath been made uſe of in traffic; and it is poſſible, that a ſlave may have trafficed only with a third, a fourth, or ſome very ſmall part, and that the reſt, conſiſting of lands ſlaves or money, is but at beſt. Upon the whole therefore it greatly behoves every man to chuſe that remedy, which may be moſt beneficial to him; but, if the creditor of a ſlave can*

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prove a converſion to the uſe of the maſter of that ſlave, he ought moſt certainly to commence his ſuit by the action de in rem verſo.

De filiis familiarum.

§ VI. Quæ diximus de ſervo et de domino, eadem intelligimus et de filio et filia, et nepote et nepte, et patre avove, cujus in poteſtate ſunt.

We underſtand what we have ſaid, concerning a ſlave and his maſter, to take place equally in regard to children under power, and their parents.

De ſenatus-conſulto Macedoniano.

§ VII. Illud proprie ſervatur in eorum perſona, quod ſenatus-conſultum Macedonianum prohibuit mutuas pecunias dari eis, qui in poteſtate parentis ſunt; et ei, qui crediderit, denegatur actio tam adverſus ipſum filium filiamve, nepotem neptemve, (ſive adhuc in poteſtate ſint, ſive morte parentis vel emancipatione ſuæ poteſtatis eſſe cœperint,) quam adverſus patrem avumve, ſive eos habeat adhuc in poteſtate, ſive emancipaverit. Quæ ideo ſenatus proſpexit, quia ſæpe onerati ære alieno creditarum pecuniarum, quas in luxuriam conſumebant, vitæ parentum inſidiabantur.

§ 7. *But children are, in ſome reſpects, particularly regarded by the* Macedonian *decree of the ſenate, which prohibits money to be lent them, whileſt they are under the power of their parents; for creditors are not ſuffered to bring any action, either againſt the children, even after they are emancipated, or againſt their parents, who emancipated them. This was a caution, which the ſenate thought proper to take, becauſe young heirs, who were loaded with their debts, contracted for the ſupport of luxury, have often indeavored, by private methods, to take away the lives of their parents.*

Senatus-conſultum Macedonianum.] This decree was called *Macedonian* from *Macedo*, the name of the perſon, who gave riſe to it: but, whether this *Macedo* was a young patrician under the power of his father, or an old uſurer, the learned commentators are in very great doubt; and they are even far from being unanimous, as to the time when this decree was firſt made. But it is certain, that the emperor *Claudius* publiſhed a law, by which, to uſe the words of *Tacitus*, he reſtrained the cruelty of creditors; *Saevitiam creditorum coercuit; ne in mortem parentum pecunias filiis-familiarum ſpectari darent. Tac. lib.* 11. *annalium.* And this law is conjectured to have been the *Macedonian Senatus-conſultum*; which, in order to reconcile the two hiſtorians *Tacitus* and *Suetonius*, is ſuppoſed by ſome to have grown obſolete in the reign of *Nero*, and afterwards to have been revived by *Veſpaſian*; for *Suetonius* writes as follows in the life of that emperor, viz. *cuncta senatui fuit Veſpaſianus decernendi, ne filiorum-fam. fœneratoribus exigendi crediti jus unquam eſſet, hoc eſt, ne poſt patris quidem mortem.* Thoſe, who have time and inclination to read more upon this ſubject, are refered to the *Syntagma* of *Henneccius, lib.* 4. *t.* 7. but particularly to *Peter Faber's Semeſtrium, lib.* 1. *cap.* 25.

De actione directa in patrem vel dominum.

§ VIII. Illud in ſumma admonendi ſumus, id, quod juſſu patris dominive contractum fuerit, quodque in rem ejus verſum erit, directo quoque poſſe à patre dominove condici, tanquam ſi principaliter cum ipſo negotium geſtum eſſet. Ei quoque, qui exercitoria vel inſtitoria actione tenetur,

tenetur, directo posse condici placet, quia hujus quoque jussu contractum intelligitur.

But, in fine, we must observe, that whatever hath been contracted for at the command of a parent or master, and converted to their use, may be recovered by a direct action against the father or master in the same manner, as if the contract had been originally made with them. And it is likewise certain, that he, who is liable to the action institoria *or* exhibitoria, *may also be sued by a direct action, inasmuch as the contract is presumed to have been made at his command.*

TITULUS OCTAVUS.

De noxalibus actionibus.

D. IX. T. 4. C. III. T. 41.

De servis. Summa.

EX maleficiis servorum, veluti si furtum fecerint, aut bona rapuerint, aut damnum dederint, aut injuriam commiserint, noxales actiones proditæ sunt, quibus domino damnato permittitur aut litis æstimationem sufferre, aut ipsum hominem noxæ dedere.

Noxal actions are given on account of the offenses of slaves; as when a slave commits a theft or robbery, or does any other damage or injury. And, when the master or owner of a slave is condemned upon this account, it is in his option either to pay the valuation of the damage done, or to deliver up his slave as a recompense.

Ex maleficiis servorum] The action *noxalis*, which lies against masters for the crimes of their servants, was always unknown in *England*; for even villeins, before the tenures in villenage were abolished, might have been convened for their own crimes. *Cowel. inst. l. 4. t. 8.* But there is something in the law of *England* similar to a noxal action, in regard to animals and things inanimate, by which the death of a man is occasioned: for, if a vitious horse, or bull, or a cart drawn by horses or oxen, occasions the death of any person, the thing, or animal, which did the mischief, becomes, as it were, sacred, and is called a *Deodand*; [*i. e.* a thing given to God;] because it was sold in antient times by the king's almoner, who distributed the money to pious uses. But, in regard to *Deodands*, the law makes many distinctions; *e. g.* if a ship or boat is laden with merchandise, and a man is killed, or drowned by the motion, yet the merchandise are no *Deodand*, tho' the accident happened in fresh water: but, if any particular merchandise falls upon a man, and kills him, that merchandise shall be *Deodand*, but not the ship. —— See *Hale*'s *Hist. of the pl. of the Crown. Vol. 1. p. 422. Hawk. pl. of the crown. lib. 1. cap. 26.*

Quid sit noxa et noxia.

§ I. Noxa autem est ipsum corpus, quod nocuit, id est, servus: noxia ipsum maleficium, veluti furtum, rapina, damnum, injuria.

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The term noxa *denotes the ſlave, by whom the male-feazance was done; and, by the word* noxia, *we underſtand the male-feaſance itſelf, be it of what kind it will, theft, damage, rapin, or injury.*

Ratio harum actionum.

§ II. Summa autem ratione permiſſum eſt noxæ deditione fungi: namque erat iniquum, nequitiam eorum ultra ipſorum corpora dominis damnoſam eſſe.

§ 2. *It is with the utmoſt reaſon allowable, that a maſter ſhould deliver the ſlave, who is culpable, as a full compenſation to the party injured; for it was unjuſt, that that it ſhould be in the power of ſlaves to cauſe their maſter to ſuffer any greater damage, than the value of their own bodies would amount to.*

Effectus noxæ deditionis.

§ III. Dominus, noxali judicio ſervi ſui nomine conventus, ſervum actori noxæ dedendo liberatur: nec minus in perpetuum ejus ſervi dominium à domino transfertur. Sin autem damnum ei, cui deditus eſt ſervus, reſarcierit quæſita pecunia, auxilio prætoris, invito domino, manumittetur.

§ 3. *If a noxal action is given againſt a maſter, he may free himſelf from it by delivering his ſlave into the poſſeſſion of the plaintiff, in whom the property in ſuch ſlave will become abſolutely veſted; but, if the ſlave can pay his new maſter in money the value of the damage, the ſlave may be manumited by the aſſiſtence of the prætor, altho' his new maſter is ever ſo unwilling.*

De origine harum actionum.

§ IV. Sunt autem conſtitutæ noxales actiones aut legibus, aut edicto prætoris: legibus, veluti furti ex lege 12 tabularum, damni injuriæ ex lege Aquilia: edicto prætoris, veluti injuriarum, et vi bonorum raptorum.

§ 4. *Noxal actions are conſtituted either by the laws, or by the edict of the prætor. They are conſtituted on account of theft by the law of the* 12 tables, *and, on account of damage injuriouſly done, by virtue of the law* Aquilia. *But, on account of injuries and goods taken by force, they are conſtituted by the edict of the prætor.*

Qui conveniuntur noxali actione.

§ V. Omnis autem noxalis actio caput ſequitur: nam, ſi ſervus tuus noxam commiſerit quamdiu in tua poteſtate ſit, tecum actio eſt. Si autem in alterius poteſtatem pervenerit, cum illo incipit actio eſſe. At, ſi manumiſſus fuerit, directo ipſe tenetur, et extinguitur noxæ deditio. Ex diverſo quoque directa actio noxalis eſſe incipit: nam, ſi liber homo noxiam commiſerit, et is ſervus tuus eſſe cœperit, (quod quibuſdam

caſibus effici primo libro tradidimus,) incipit tecum eſſe noxalis actio, quæ ante directa fuiſſet.

§ 5. *Every noxal action follows the perſon of the ſlave, by whom the male-feazance was commited; but, as long as he continues under the power of his maſter, his maſter only is liable to an action; and, if he becomes ſubject to a new maſter, then the new maſter becomes liable: but, if the ſlave is manumited, he may be proſecuted by a direct action; for then the* noxæ deditio *is extinguiſhed; becauſe no ſurrender can then be made of him, by whom the male-feazance was commited. But, on the contrary, an action, which was at firſt direct, may afterwards become noxal: for if a man, who is free, does any male-feazance, and afterwards becomes a ſlave,* [*and we have, in our firſt book declared in what caſes this may happen,*] *then the action, which was before direct, begins to be a noxal action againſt his maſter.*

Si ſervus Domino noxiam commiſerit, vel contra.

§ VI. Si ſervus domino noxiam commiſerit, actio nulla naſcitur: namque inter dominum et eum, qui in poteſtate ejus eſt, nulla obligatio naſci poteſt. Ideoque, ſi in alienam poteſtatem ſervus pervenerit, aut manumiſſus fuerit, neque cum ipſo, neque cum eo, cujus nunc in poteſtate ſit, agi poteſt: unde, ſi alienus ſervus tibi noxiam commiſerit, et is poſtea in poteſtate tua eſſe cœperit, interdicitur actio: quia in ea caſum deducta ſit, in quo conſiſtere non potuit. Ideoque, licet exierit de tua poteſtate, agere non potes: quemadmodum ſi dominus in ſervum ſuum aliquid commiſerit, nec, ſi manumiſſus aut alienatus fuerit ſervus, ullam actionem contra dominum habere poteſt.

§. 6. *Altho' a ſlave commits a male-feazance againſt his maſter, yet no action is given; for no obligation can ariſe between a maſter and his ſlave; and therefore, if that ſlave paſſes under the power of another maſter, or is manumited, no action can be brought either againſt him in his own perſon, or againſt his new maſter; from whence it follows, that, if the ſlave of another ſhould commit any male-feazance, for example, againſt* Titius, *and ſhould afterwards become the ſlave of the ſame* Titius, *the action is extinguiſhed; for it is a maxim, that an action becomes extinct, whenever it is brought into a ſtate, in which it could not have had a commencement; and hence it is, that altho' a ſlave, from whom a maſter hath received damage, ſhould ceaſe to be under the power of that maſter, yet no action can afterwards be given againſt ſuch ſlave; neither can a ſlave, who hath been alienᵈ or manumited, bring any actions againſt his late maſter, by whom he hath been ill treated.*

De filiis-familiarum.

§ VII. Sed veteres quidem hoc in filiis-familiarum maſculis et fœminis admiſere: nova autem hominum converſatio hujuſmodi aſperitatem recte reſpuendam eſſe exiſtimavit, et ab uſu communi hoc penitus receſſit. Quis enim patiatur, filium ſuum, et maxime filiam, in noxam alii dari? ut pene per filii corpus pater magis quam filius periclitetur; cum in filiabus etiam pudicitiæ favor hoc bene excludat. Et ideo placuit, in ſervos tantummodo noxales actiones eſſe proponendas; cum,

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apud veteres legum commentatores, invenerimus ſæpius dictum, ipſos filios-familiarum pro ſuis delictis poſſe conveniri.

§ 7. *The antients indeed admited this law of the forfeiture of the perſon to take place, even in caſes, in which their children were concerned, whether male or female: but the later ages have rightly thought that ſuch a rigorous proceeding ought, by all means, to be exploded; and it hath therefore paſſed wholly into diſuſe: for who could ſuffer a ſon, and more eſpecially a daughter, to be delivered up as a forfeiture to a ſtranger? for, in the caſe of a ſon, the puniſhment of the father would be greater, than that of the ſon; and, in the caſe of a daughter, the rules of modeſty forbid ſuch a practice. It hath therefore prevailed, that noxal actions ſhould only take place in regard to ſlaves; and, in the books of the antient commentators of the law, we find it often repeated, that the ſons of a family may themſelves be convened for their own miſdeeds.*

TITULUS NONUS.

Si quadrupes pauperiem feciſſe dicatur.

D. ix. T. i.

De actione, ſi quadrupes ex l. 12 tab.

ANimalium nomine, quæ ratione carent, ſi qua laſcivia, aut pavore, aut feritate, pauperiem fecerint, noxalis actio lege 12 tab. prodita eſt: quæ animalia, ſi noxæ dedantur, proficiunt reo ad liberationem: quia ita lex tabularum ſcripta eſt, ut puta, ſi equus calcitroſus calce percuſſerit, aut bos, cornu petere ſolitus, cornu petierit. Hæc autem actio in iis, quæ contra naturam moventur, locum habet. Cæterum, ſi genitalis ſit feritas, ceſſat actio. Denique, ſi urſus fugerit à domino, et ſic nocuerit, non poteſt quondam dominus conveniri, quia deſiit dominus eſſe, ubi fera evaſit. Pauperies autem eſt damnum ſine injuria facientis datum. Nec enim poteſt animal injuriam feciſſe dici, quod ſenſu caret. Hæc quidem ad noxalem pertinent actionem.

A noxal action is given by the law of the 12 tables, *whenever any damage is done by brute animals, thro' wantonneſs, fright, or furiouſneſs; but, if they are delivered up in atonement for the damage done, the defendent muſt be diſcharged from the action; for it is thus written in the law of the* 12 tables, *if* an horſe, apt to kick, ſhould ſtrike with his foot; or if an ox, accuſtomed to gore, ſhould wound any man with his horns, &c. *But a noxal action takes place only in regard to thoſe animals, which act contrary to their nature; for, when the ferocity of a beaſt is innate, no action can be given; ſo that, if a bear breaks looſe from his maſter, and miſchief is*

done, the perſon, to whom this animal belonged, cannot be convened; for he ceaſed to be the maſter as ſoon as the beaſt eſcaped. But it is here to be noted, that the word pauperies *denotes a damage, by which no injury is intended; for an animal, which hath no reaſon, cannot be ſaid to have commited an injury. This is what relates to noxal actions.*

De actione ædilitia, concurrente cum actione de pauperie.

§ I. Cæterum ſciendum eſt, ædilitio edicto prohiberi nos canem, verrem aprum, urſum, leonem, ibi habere, qua vulgo iter fit: et, ſi adverſus ea factum erit, et nocitum libero homini eſſe dicatur, quod bonum et æquum judici videtur, tanti dominus condemnetur: cæterarum vero rerum, quanti damnum datum ſit, dupli. Præter has autem ædilitias actiones, et de pauperie locum habebit: nunquam enim actiones, præſertim pœnales, de eadem re concurrentes, alia aliam conſumet.

§ 1. *It muſt be obſerved, that the edict of the Edile prohibits any man to keep a dog, a boar, a bear, or a lion, where there is a public paſſage or highway: and, if this prohibition is diſobeyed, and any freeman receives hurt, the maſter of the beaſt may be condemned in whatever ſum ſeems agreeable to equity in the opinion of the judge; yet, in regard to every other damage, the condemnation muſt be in the double of what the damage amounts to. It is here neceſſary to inform the ſtudent, that not only the* Edilitian *action, but alſo an action for the damage, called* pauperies, *may both take place againſt the ſame perſon; for, altho' actions, and more eſpecially thoſe, which are penal, concur together on account of the ſame thing, they are not deſtructive the one of another.*

De eadem re concurrentes.] The ſame doctrine is delivered by *Ulpian*, *ff.* 44. *t.* 7. *l.* 60. *ff.* 50. *t.* 17. *l.* 130. which doctrine we muſt underſtand to regard penal actions, concurring on account of the ſame thing, but yet ariſing from different facts and offenſes; as for inſtance, if a man ſteals a ſlave, and afterwards murders him, ſuch a criminal may be doubly proſecuted, for theft and injurious damage; for as the actions of theft and injurious damage would ariſe in this caſe from different offenſes, the one will not bar the other: but, on the contrary, if two penal actions, concurring on account of the ſame thing, ſhould ariſe from the ſame offenſe, the one would deſtroy the other, and therefore the plaintiff muſt make his election. *vid. Cuj. obſerv. lib.* 8. *c.* 24. *Hotom. illuſt. quæſt.* 29.

TITULUS

TITULUS DECIMUS.

De iis, per quos agere poſſumus.

Per quos agere liceat.

NUNC admonendi ſumus, agere poſſe quemlibet hominem aut ſuo nomine aut alieno. Alieno, veluti procuratorio, tutorio, curatorio; cum olim in uſu fuiſſet, alterius nomine agi non poſſe, niſi pro populo, pro libertate, pro tutela. Præterea lege Hoſtilia permiſſum erat furti agere eorum nomine, qui apud hoſtes eſſent, aut reipublicæ cauſa abeſſent, quive in eorum cujus tutela eſſent. Sed, quia hoc non minimam incommoditatem habebat, quod alieno nomine neque agere, neque excipere actionem, licebat, cœperunt homines per procuratores litigare. Nam et morbus et ætas et neceſſaria peregrinatio, itemque aliæ multæ cauſæ ſæpe hominibus impedimento ſunt, quo minus rem ſuam ipſi exequi poſſint.

Any man may commence a ſuit, either in his own name, or in that of another; as in the name of a proctor, a tutor, or a curator; but antiently, one perſon could not ſue in the name of another, unleſs in a cauſe of liberty, tutelage, or where a ſociety was concerned. It was afterwards permited by the law Hoſtilia, *that an action of theft might be brought in the names of thoſe, who were captives in the hands of the enemy, --- who were abſent upon the affairs of the republic, --- or who were under the care of tutors. But, as it was found in later times to be highly inconvenient, that any man ſhould be prohibited, either from ſuing, or defending in the name of another, it by degrees became a practice to ſue by proctors: for ill health, old age, the neceſſity of voyaging, and many other caſes, continually prevent mankind from being able to proſecute their own affairs in perſon.*

Aut ſuo nomine aut alieno.] In *England* the liberty of conſtituting an attorney to proſecute ſuits is given chiefly by the ſtatute law. *vid.* 20 *H.* 3. *cap.* 10. 12 *Edw.* 2. *cap.* 1. 15 *Edw.* 2. *cap.* 1. 7 *Ric.* 2. *cap.* 14. 7 *Hen.* 4. *cap.* 13. 29 *Eliz. cap.* 5. For, by the common law, the plaintiff or defendent, demandant or tenent, could not appear by attorney without the king's writ, or letters patent, but ought to follow his ſuit in his own proper perſon. *Abuſion eſt* [ſays the author of the Mirror] *a reteinir attorny ſans breve de la chancerie.* Co. Litt. 128. *a.*

Quibus modis procurator conſtituatur.

§ I. Procurator neque certis verbis, neque præſente ſemper adverſario, imo et plerumque eo ignorante, conſtituitur. Cuicunque enim permiſeris rem tuam agere, aut defendere, is tuus procurator intelligitur.

§ 1. *It is not neceſſary to uſe any certain form of words in appointing a proctor, nor to make the appointment in the preſence of the adverſe party; for it is generally done*

even

even without his knowledge: and note, that whoever is imployed either to ſue or to defend for another, is underſtood to be a proctor.

Quibus modis tutores vel curatores conſtituuntur.

§ II. Tutores et curatores quemadmodum conſtituantur, primo libro expoſitum eſt.

§ 2. *We have already explained in the firſt book of our inſtitutes, how tutors and curators may be appointed.*

Primo libro.] vid. book the 1ſt, title 13.

TITULUS UNDECIMUS.

De ſatiſdationibus.

D.ii.T.8. C.ii.T.57.

De judicio perſonali.

SAtisdationum modus alius antiquitati placuit, alium novitas per uſum amplexa eſt. Olim enim, ſi in rem agebatur, ſatisdare poſſeſſor compellebatur, ut, ſi victus eſſet, nec rem ipſam reſtitueret, nec litis æſtimationem, poteſtas eſſet petitori aut cum eo agendi, aut cum fidejuſſoribus ejus: quæ ſatiſdatio appellatur *judicatum ſolvi*: unde autem ſic appelletur, facile eſt intelligere. Namque ſtipulabatur quis, ut ſolveretur ſibi, quod fuiſſet judicatum: multo magis is, qui in rem actione conveniebatur, ſatiſdare cogebatur, ſi alieno nomine judicium accipiebat. Ipſe autem, qui in rem agebat, ſi ſuo nomine petebat, ſatiſdare non cogebatur. Procurator vero, ſi in rem agebat, ſatiſdare jubebatur, *rem ratam dominum habiturum.* Periculum enim erat, ne iterum dominus de eadem re experiretur. Tutores vero et curatores eodem modo, quo procuratores, ſatiſdare debere, verba edicti faciebant. Sed aliquando his agentibus ſatiſdatio remittebatur. Hæc ita erant, ſi in rem agebatur.

In taking ſecurity, the antients purſued a different method from that, which the moderns have made choice of; for antiently, if a real action was brought, the defendent, or party in poſſeſſion, was compelled to give ſecurity, to the end, that, if he loſt his cauſe, and would neither reſtore the thing itſelf, nor pay the eſtimation of it, the demandant might be inabled either to ſue ſuch defendent, or the parties bound for him; and this ſpecies of caution is termed judicatum ſolvi; *nor is it difficult to underſtand, why it is ſo called; ſince every demandant ſtipulated, that the thing adjudged to him ſhould be paid. We have already obſerved, that whoever defended his own cauſe, was obliged to give ſecurity, it is therefore with much greater reaſon, that the proctor in the cauſe of another ſhould be compelled to give caution. But, if a demandant in a real*

a real action had ſued in his own name, he was under no neceſſity of giving ſecurity; yet, if he ſued only as a proctor, he was obliged to give caution, that his acts would be ratified by his principal rem ratam dominum habiturum; *for the danger was, leſt the client or party principal ſhould bring a freſh ſuit for the ſame thing: and, by the words of the edict, even tutors and curators were compelable to give caution, as well as proctors, tho' it was ſometimes remited, when tutors, or curators, were demandants; and ſuch was the practice in regard to real actions.*

De judicio perſonali.

§ I. Si vero in perſonam, ab actoris quidem parte eadem obtinebant, quæ diximus in actione, qua in rem agitur: ab ejus vero parte, cum quo agitur, ſiquidem alieno nomine aliquis interveniret, omnimodo ſatiſdaret, quia nemo defenſor in aliena re ſine ſatiſdatione idoneus eſſe creditur. Quod ſi proprio nomine aliquis judicium accipiebat in perſonam, *judicatum ſolvi* ſatisdare non cogebatur.

§ 1. *The ſame rules, which were obſerved in real, obtained alſo in perſonal actions, in regard to the taking ſecurity on the part of the plaintiff; and, if the defendent in a perſonal action proceeded in another's name, he was obliged to give caution; for no one was reputed a competent defendent in the cauſe of another, unleſs ſecurity was given; but, whenever any man was convened in a perſonal action to defend his own cauſe, he was not compeled to give caution, that the thing adjudged ſhould be paid.*

Jus novum. De reo.

§ II. Sed hodie hæc aliter obſervantur. Sive enim quis in rem actione convenitur, ſive perſonali, ſuo nomine, nullam ſatiſdationem pro litis æſtimatione dare compellitur; ſed pro ſua tantum perſona, quod in judicio permaneat uſque ad terminum litis; vel committitur ſuæ promiſſioni cum jurejurando, quam juratoriam cautionem vocant; vel nudam promiſſionem, vel ſatiſdationem, pro qualitate perſonæ, ſuæ dare compellitur.

§ 2. *But at preſent we obſerve a very different practice; for, if a defendent is now convened either in a real or perſonal action, in his own cauſe, he is not compelable to give ſecurity for the payment of the eſtimation of the ſuit, but only for his own perſon, to wit, that he will remain in judgment till the cauſe is determined: and this ſecurity is ſometimes given by ſureties; ſometimes by a promiſe upon oath, which is called a juratory caution; and ſometimes by a ſimple promiſe without an oath, according to the quality of the perſon of the defendent.*

De procuratore actoris.

§ III. Sin autem per procuratorem lis vel infertur vel ſuſcipitur; in actoris quidem perſona, ſi non mandatum actis inſinuatum eſt, vel præſens dominus litis in judicio procuratoris ſui perſonam confirmaverit, ratam rem dominum habiturum, ſatiſdationem procurator dare compellitur.

pellitur. Eodem obſervando et ſi tutor vel curator, vel aliæ tales perſonæ, quæ alienarum rerum gubernationem receperunt, litem quibuſdam per alium inferunt.

§ 3. *But, if a ſuit is commenced or defended by a proctor, the proctor of the plaintiff, if he does not either inrol a mandate of appointment in the acts of court, or cauſe his client to nominate him publicly, is obliged to give ſecurity, that his client will ratify his proceeding. The ſame rule is alſo to be obſerved, if a tutor, curator, or any perſon, to whom the management of the affairs of others is intruſted, commences a ſuit by a proctor.*

De procuratore rei præſentis.

§. IV. Si vero aliquis convenitur, ſiquidem præſens procuratorem dare paratus eſt, poteſt vel ipſe in judicium venire, et ſui procuratoris perſonam per *judicatum ſolvi* ſatiſdationem ſolemni ſtipulatione firmare; vel extra judicium ſatiſdationem exponere, per quam ipſe ſui procuratoris ſidejuſſor exiſtat pro omnibus *judicatum ſolvi* ſatiſdationis clauſulis. Ubi et de hypotheca ſuarum rerum convenire compellitur, ſive in judicio promiſerit, ſive extra judicium caverit, ut tam ipſe quam hæredes ejus obligentur. Alia inſuper cautela, vel ſatiſdatione propter perſonam ipſius exponenda, quod tempore ſententiæ recitandæ in judicium veniet, vel, ſi non venerit, omnia dabit fidejuſſor, quæ in condemnatione continentur, niſi fuerit provocatum.

§ 4. *But, when a party is convened, if he is ready to nominate a proctor, ſuch party may appear in open court, and confirm the nomination by giving the caution* judicatum ſolvi *under the uſual ſtipulation; or he may appear out of court, and become himſelf the ſurety, that his proctor will perform all the covenants in the inſtrument of caution; and whether the party convened does this in court, or out of court, he is obliged to make his eſtate chargeable, that his heirs, as well as himſelf, may be liable to an action. And a farther ſecurity muſt likewiſe be given, that he will either appear in perſon at the time of pronouncing ſentence, or that his ſureties, in caſe of his non-appearance, ſhall be bound to pay whatever the ſentence exacts, if no appeal is interpoſed.*

De procuratore rei abſentis.

§ V. Si vero reus præſto ex quacunque cauſa non fuerit, et alius velit defenſionem ejus ſubire, nulla differentia inter actiones in rem vel perſonales introducenda, poteſt hoc facere: ita tamen ut ſatiſdationem *judicatum ſolvi* pro litis æſtimatione præſtet. Nemo enim ſecundum veterem regulam (ut jam dictum eſt) alienæ rei ſine ſatiſdatione defenſor idoneus intelligitur.

§ 5. *When a defendent does not give an appearance, then any other perſon, who is willing, may take upon himſelf the defenſe for him, and this may be done either in a real or perſonal action without diſtinction, if the caution* judicatum ſolvi *is entered into for the payment of the eſtimation of the ſuit; for no man, (according to the antient rule*

rule already mentioned,) can be ſaid to defend the cauſe of another legally, unleſs ſecurity is given.

Unde hæc forma diſcenda.

§ VI. Quæ omnia apertius et perfectius quotidiano judiciorum uſu in ipſis rerum documentis apparent.

§ 6. *But all ſuch formalities may be more perfectly learned, from the uſage and practice of courts.*

Ubi hæc forma obſervanda.

§ VII. Quam formam non ſolum in hac regia urbe, ſed etiam omnibus noſtris provinciis, (etſi propter imperitiam forte aliter celebratur,) obtinere cenſemus: cum neceſſe ſit, omnes provincias caput omnium noſtrarum civitatum, id eſt, hanc regiam urbem, ejuſque obſervantiam, ſequi.

§ 7. *We have judged it expedient, that theſe forms ſhall obtain not only in* Conſtantinople, *but alſo in all our other provinces, in which a different practice may have hitherto prevailed thro' the want of knowledge; for it is neceſſary, that all the provinces ſhould be guided by the example of the capitol of our dominions, and follow the practice of our royal city.*

TITULUS DUODECIMUS.

De perpetuis et temporalibus actionibus, et quæ ad hæredes et in hæredes tranſeunt.

C. iv. T. ii.

De perpetuis et temporalibus actionibus.

HOC loco admonendi ſumus, eas quidem actiones, quæ ex lege, ſenatuſve conſulto, ſive ex ſacris conſtitutionibus, proficiſcuntur, perpetuo ſolere antiquitus competere, donec ſacræ conſtitutiones tam in rem, quam in perſonam, actionibus certos fines dederunt: eas vero, quæ ex propria prætoris juriſdictione pendent, plerumque intra annum vivere: nam et ipſius prætoris intra annum erat imperium. Aliquando tamen et in perpetuum extenduntur: id eſt, uſque ad finem conſtitutionibus introductum: quales ſunt eæ, quas bonorum poſſeſſori,

cæteriſque, qui hæredis loco ſunt, accommodat. Furti quoque manifeſti actio, quamvis ex ipſius prætoris juriſdictione proficiſcatur, tamen perpetuo datur. Abſurdum enim eſſe exiſtimavit, anno eam terminari.

All thoſe actions, which took their riſe from the law, the decrees of the ſenate, or the conſtitutions, were antiently reputed perpetual; but the later emperors have by their ordinances fixed certain limits both to real and perſonal actions. Actions, given by virtue of the prætor's authority, are generally limited to the ſpace of one year; for ſuch is the duration of his office; but ſometimes the prætorian actions are made perpetual; that is, they are extended to the limits introduced by the conſtitutions; ſuch are thoſe actions, which the prætor gives to the poſſeſſors of goods, and to others, who hold the place of heirs. The action of manifeſt theft is alſo perpetual, altho' it proceeds from the mere authority of the prætor; for it was thought abſurd, that this action ſhould determine within the ſpace of a year.

Perpetuo ſolere.] It is certain, that the time of bringing actions in *England* has been limited by ſome of our earlieſt acts of parliament; and from hence it hath become the general opinion, that limitations were unknown to the common law. Till the 20th of *Henry* the 3d's reign, the limitation of a writ of right was from the time of *Henry* the *firſt*, [*a tempore regis Henrici ſenioris.*] but, by the ſtatute *de merton, editum anno* 20. *Hen.* 3. it is enacted, that the limitation of a writ of right ſhall commence from the time of *Henry* the 2d, who began his reign in 1154, whereas *Henry* the 1ſt began his reign in *Auguſt* 1100; ſo that this ſtatute made the limitation ſhorter by 54 years. Aſſiſes of mort-auncеſter were alſo by the ſame ſtatute reduced to commence from the laſt return of king *John* out of *Ireland*, which was in the 12th year of his reign: and, in regard to aſſizes of novel diſſeiſin, it is likewiſe enacted, *ut non excedant primam transfretationem domini regis, qui nunc eſt.* [viz. H. 3.] *in Vaſconiam.* The limitation of a writ of right was afterwards reduced to a narrower compaſs by the ſtat. of *Weſtminſter*, 3 *Edw.* 1; which limits it to commence only from the time of *Richard* the 1ſt; *i. e.* from the 1ſt day of his reign. But theſe limitations from fixed periods became in proceſs of time too large and extended; ſo that, as lord *Coke* obſerves, many ſuits, troubles, and inconveniences aroſe; and therefore the makers of the ſtatute of 32 *H.* 8. took another and more direct courſe, which might indure for ever; and that was, to impoſe diligence and vigilance in him, who was to bring his action; ſo that, by one conſtant law, certain limitations might ſerve, both for the time preſent and all future times. *vid. Co. Litt.* 115. *a.* 2 *Co. inſt.* 94. 95. The reader is refered to the ſtatutes of 32 *H.* 8. *cap.* 2. and 21 *Jac.* 1. *cap.* 16. in which acts the time of bringing almoſt every ſpecies of action is aſcertained within permanent and ſalutary limits.

Conſtitutionibus introductum.] *vid. Cod.* 7. *t.* 39. *ll.* 4. 5. *Cod.* 7. *t.* 40. *ff.* 5. *t.* 5.

De actionibus, quæ in hæredes tranſeunt vel non.

§ I. Non autem omnes actiones, quæ in aliquem aut ipſo jure competunt, aut à prætore dantur, et in hæredem æque competunt, aut dari ſolent. Eſt enim certiſſima juris regula, ex maleficiis pœnales actiones in hæredem rei non competere; veluti furti, vi bonorum raptorum, injuriarum, damni, injuriæ. Sed hæredibus hujuſmodi actiones competunt, nec denegantur; excepta injuriarum actione, et ſi qua alia ſimilis inveniatur. Aliquando tamen etiam ex contractu actio contra hæredem non competit; veluti cum teſtator doloſe verſatus ſit, et ad hæredem ejus nihil ex eo dolo pervenit. Pœnales autem actiones, quas ſupra diximus, ſi ab ipſis principalibus perſonis fuerint conteſtatæ, et hæredibus dantur et contra hæredes tranſeunt.

§ 1. *But*

§ 1. *But all actions in general, which either the law, or the prætor, gives againſt any man, will not alſo be given againſt his heirs; for it is a moſt certain rule of law, that penal actions, ariſing from a male-ſcazance, will not lie againſt the heir of an offender; as for inſtance, actions of theft, rapin, injury, or damage injuriouſly done: but nevertheleſs theſe actions will paſs to heirs, and are never denied, but in an action of injury, and in other caſes of a ſimilar nature; yet ſometimes even an action of contract will not lie againſt an heir, as when a teſtator acts fraudulently, and nothing comes to the poſſeſſion of the heir by reaſon of the fraud; but, if the penal actions, of which we have already ſpoken, are once conteſted by the principal parties concerned, they will afterwards paſs both to, and againſt, the heirs of ſuch parties.*

Non autem omnes actiones.] It is a maxim in the law of *England*, "that perſonal actions "die with the perſon; ſo that, if a tenent for "years commits waſte, and dies, an action of "waſte will not lie againſt his executors —— "or if the keeper of a priſon permits a man "in execution to eſcape and afterwards dies, "no action will lie againſt his executors —— "or if a battery is commited upon a man, "and either the aggreſſor, or the party aggrieved ſhould die, the action is gone."

Si, pendente judicio, reus actori ſatisfecerit.

§ II. Supereſt, ut admoneamus, quod, ſi ante rem judicatam is, cum quo actum eſt, ſatisfaciat actori, officio judicis convenit eum abſolvere; licet in ea cauſa fuiſſet judicii accipiendi tempore, ut damnari deberet; et hoc eſt, quod antea vulgo dicebatur, omnia judicia abſolutoria eſſe.

§ 2. *It remains to be obſerved, that, if the defendent before ſentence gives full ſatisfaction to the plaintiff, it is the duty of the judge to diſmiſs ſuch defendent, altho', at the time of conteſtation of ſuit, his cauſe was ſo bad, that he deſerved to be condemned; and upon this account it was antiently a common ſaying, that all actions were diſmiſſible.*

TITULUS DECIMUS-TERTIUS.

De exceptionibus.

D. xliv. T. 1. C. viii. T. 36.

Continuatio. Ratio exceptionum.

SEquitur, ut de exceptionibus diſpiciamus. Comparatæ autem ſunt exceptiones defendendorum eorum gratia, cum quibus agitur. Sæpe enim accidit, ut licet ipſa perſecutio, qua actor experitur, juſta ſit, tamen iniqua ſit adverſus eum, cum quo agitur.

It follows, that we ſhould treat of exceptions. Exceptions have been introduced into cauſes for the defenſe of the party cited; for it often happens, that a ſuit, which in itſelf is juſt, may yet become unjuſt, when commenced againſt a wrong perſon.

Exempla : quod metus cauſa, de dolo, in factum.

§ I. Verbi gratia, ſi metu coactus, aut dolo inductus, aut errore lapſus, ſtipulanti Titio promiſiſti, quod non debueras promittere, palam eſt, jure civili te obligatum eſſe, et actio, qua intenditur, dare te oportere, efficax eſt: ſed iniquum eſt, te condemnari. Ideoque datur tibi exceptio, quod metus cauſa, aut doli mali, aut in factum, compoſita ad impugnandam actionem.

§ 1. *If a man, who is compelled by fear, or induced by fraud or miſtake, makes a promiſe to* Titius, *for example, by ſtipulation; yet it is evident, that he is bound by the civil law, and that* Titius *may have an efficacious action; but it would be unjuſt, that a condemnation ſhould follow; and therefore the party, who made ſuch promiſe, is permited to plead exceptive matter in bar to the action, by ſeting forth, that the promiſe was extorted by fear or fraud, or otherwiſe by alleging the peculiar circumſtances of the caſe, whatever they are; and theſe are called exceptions* in factum compoſita; *i. e. exceptions on the fact.*

De non numerata pecunia.

§ II. Idem juris eſt, ſi quis quaſi credendi cauſa pecuniam a te ſtipulatus fuerit, neque numeraverit. Nam, eam pecuniam à te petere poſſe eum, certum eſt: dare enim te oportet, cum ex ſtipulatione tenearis. Sed, quia iniquum eſt, eo nomine te condemnari, placet, exceptione pecuniæ non numeratæ te defendi debere: cujus tempora nos (ſecundum quod jam ſuperioribus libris ſcriptum eſt) conſtitutione noſtra coarctavimus.

§ 2. *The ſame practice prevails, if* Sempronius, *for example, cauſes* Titius *to ſtipulate to repay him money, which* Titius *never received from him. It is certain, that* Sempronius *in this caſe may bring an action, for* Titius *is bound by the ſtipulation, yet as it would be unjuſt, that he ſhould be condemned upon that account, he is allowed to defend himſelf by an exception* pecuniæ non numeratæ, *i. e. on account of money not paid. But by our expreſs conſtitution we have ſhortened the time allowed for bringing this exception, as we have already obſerved in the former book.*

Conſtitutione noſtra.] See *Cod. 4. t. 30. l. 14.* The time limited for bringing the exception *of money not paid* was anciently the ſpace of five years; but *Juſtinian* reſtrained it to two years. *See the 22d title of the 3d inſtitute.*

De pacto.

§ III. Præterea debitor, ſi pactus fuerit cum creditore, ne à ſe pecunia peteretur, nihilominus obligatus manet; quia pacto convento obligationes non omnino diſſolvuntur: qua de cauſa efficax eſt adverſus eum actio, quam actor intendit, *ſi paret, eum dare oportere:* ſed, quia iniquum eſt, contra pactionem eum condemnari, defenditur per exceptionem pacti conventi.

§ 3. *And*

§ 3. *And farther, altho' a debtor enters into a compact with his creditor, that his creditor ſhall not ſue him, yet the debtor remains bound; for obligations are not to be wholly diſſolved by a nude agreement; and therefore an action in this form,* si paret, eum dare oportere, *would be efficacious againſt the debtor; but, as it would be unjuſt, that the debtor ſhould be condemned to make payment, notwithſtanding the agreement, he is therefore permited to defend himſelf by an exception of compact.*

De jurejurando.

§ IV. Æque, ſi debitor creditore deferente juraverit, nihil ſe dare oportere, adhuc obligatus permanet: ſed, quia iniquum eſt de perjurio quæri, defenditur per exceptionem jurisjurandi. In iis quoque actionibus, quibus in rem agitur, æque neceſſariæ ſunt exceptiones; veluti ſi petitore deferente poſſeſſor juraverit, eam rem ſuam eſſe, et nihilo minus petitor eandem rem vindicet. Licet enim verum ſit, quod intendit, id eſt, rem ejus eſſe; iniquum tamen eſt, poſſeſſorem condemnari.

§ 4. *If an oath is adminiſtered to a debtor at the inſtance of his creditor, and ſuch debtor ſwears, that nothing is due from him, yet he ſtill remains obligated: but, as it would not be right, that the plaintiff ſhould afterwards complain of perjury, the debtor may defend himſelf by alleging his own oath by way of exception. Exceptions of this ſort are likewiſe equally neceſſary in real actions; as when the party in poſſeſſion takes an oath at the requeſt of the demandant, and ſwears, that the thing in diſpute is his own, and the demandant will nevertheleſs indeavor to recover it: for altho' the demandant's allegation is true;* viz. *that the thing claimed appertains to him; yet it is unjuſt, that the poſſeſſor ſhould be condemned.*

De re judicata.

§ V. Item, ſi judicio tecum actum fuerit, ſive in rem, ſive in perſonam, nihilominus obligatio durat: et ideo ipſo jure de eadem re poſtea adverſus te agi poteſt: ſed debes per exceptionem rei judicatæ adjuvari.

§ 5. *If a man hath been ſued either upon a real or perſonal action, the obligation nevertheleſs remains; and therefore, in ſtrict law, he may again be ſued upon the ſame account; but, in caſe of a ſecond ſuit, he may be relieved, if he alleges by way of exception, that the cauſe hath already been adjudged.*

De cæteris exceptionibus.

§ VI. Hæc exempli cauſa retuliſſe ſufficiat: alioqui, quam ex multis variiſque cauſis exceptiones neceſſariæ ſint, ex latioribus digeſtorum ſeu pandectarum libris intelligi poteſt.

§ 6. *It may ſuffice to have given theſe inſtances of exceptions in general; but in how many and in what various caſes they are neceſſary, may be more fully learned from the larger books of the digeſts.*

Ex latioribus digeſtorum libris.] *vid. ff.* 4. *t.* 1. *cum ſeqq.*

Diviſio

Diviſio prima.

§ VII. Quarum quædam ex legibus, vel iis, quæ legis vicem obtinent, vel ex ipſius prætoris juriſdictione, ſubſtantiam capiunt.

§ 7. *Some exceptions proceed from the laws themſelves, or from thoſe regulations, which hold the place of laws; but others take their riſe from the authority of the prætor.*

Diviſio ſecunda.

§ VIII. Appellantur autem exceptiones aliæ perpetuæ et peremptoriæ, aliæ temporales et dilatoriæ.

§ 8. *Some exceptions are called perpetual and peremptory; others are termed temporary and dilatory.*

De peremptoriis.

§ IX. Perpetuæ et peremptoriæ ſunt, quæ ſemper agentibus obſtant, et ſemper rem, de qua agitur, perimunt: qualis eſt exceptio doli mali, et quod metus cauſa factum eſt, et pacti conventi, cum ita convenerit, ne omnino pecunia peteretur.

§ 9. *The perpetual and peremptory are thoſe, which always obſtruct the party agent, and deſtroy the force of the action --- of this ſort is the exception of fraud, of fear, and of compact, when it is agreed, that the money ſhall not be ſued for.*

De dilatoriis.

§ X. Temporales atque dilatoriæ ſunt, quæ ad tempus nocent, et temporis dilationem tribuunt: qualis eſt pacti conventi, cum ita convenerit, ne intra certum tempus ageretur, veluti intra quinquennium: nam, finito eo tempore, non impeditur actor rem exequi. Ergo ii, quibus intra certum tempus agere volentibus objicitur exceptio aut pacti conventi, aut alia ſimilis, differre debent actionem, et poſt tempus agere. Ideo enim dilatoriæ iſtæ exceptiones appellantur. Alioqui, ſi intra tempus egerint, objectaque ſit exceptio, neque eo judicio quicquam conſequebantur propter exceptionem, neque poſt tempus olim agere poterant, cum temere rem in judicium deducebant et conſumebant; qua ratione rem admittebant. Hodie autem non ita ſtricte hoc procedere volumus; ſed eum, qui ante tempus pactionis vel obligationis litem inferre auſus ſit, Zenonianæ conſtitutioni ſubjacere cenſemus, quam ſacratiſſimus legiſlator de iis, qui tempore plus petierint, protulit: et inducias, quas ipſe actor ſponte indulſerit, vel quas natura actionis continet, ſi contempſerit, in duplum habeant ii, qui talem injuriam paſſi ſunt; et, poſt eas finitas, non aliter litem ſuſcipiant, niſi omnes expenſas litis antea acceperint: ut actores, tali pœna perterriti, tempora litium doceantur obſervare.

§ 10. *Tem-*

§ 10. *Temporary and dilatory exceptions are thoſe, which operate for a time, and create delay: ſuch is the exception of an agreement not to perſue a debt within a certain time, as within five years; but at the expiration of that time the creditor may proceed; and therefore thoſe, againſt whom an exception of agreement, or any other ſimilar exception can be objected, muſt delay their action, and not ſue, till the time agreed upon is expired; and it is for this reaſon, that thoſe exceptions are termed dilatory: and formerly, if the parties agent had ſued within the time, in which it was agreed not to ſue, and an exception was interpoſed, it not only hindered ſuch parties from obtaining in that cauſe; but it alſo diſabled them from proceeding, even after the expiration of the time agreed on; for they were reputed to have loſt their right, by having commenced a temerary ſuit. But we have been willing to mitigate this rigor, and have decreed, that whoever preſumes to commence a ſuit before the time limited by the agreement, ſhall be ſubject to the conſtitution of* Zeno *concerning thoſe, who demand more than their due: and, if a party agent breaks in upon the time, which he has before ſpontaneouſly allowed, or contemns the limits, which the nature of ſome actions allow, the party defendent, who ſuffers ſuch injurious treatment, becomes intituled to twice the time before allowed, and, even when that is expired, can not be obliged to give an appearance, till he has been reimburſed the whole of his expenſes; and this we have ordained* in terrorem, *that all plaintiffs may be taught to obſerve the proper time of commencing their ſuits.*

Subjacere cenſemus.] Neither the conſtitution of *Zeno*, nor that of *Juſtinian*, is extant.

De dilatoriis ex perſona.

§ XI. Præterea etiam ex perſona ſunt dilatoriæ exceptiones, quales ſunt procuratoriæ, veluti ſi per militem, aut mulierem, agere quis velit. Nam militibus nec pro patre, vel matre, vel uxore, nec ex ſacro reſcripto, procuratorio nomine experiri conceditur. Suis vero negotiis ſupereſſe ſine offenſa militaris diſciplinæ poſſunt. Eas vero exceptiones, quæ olim procuratoribus propter infamiam vel dantis, vel ipſius procuratoris, opponebantur, cum in judiciis frequentari nullo modo perſpeximus, conquieſcere ſancimus; ne, dum de his altercatur, ipſius negotii diſceptatio proteletur.

§ 11. *Dilatory exceptions may alſo ariſe by reaſon of the perſon of the party ſuing; ſuch are thoſe, which are made againſt proctors; as if a ſuitor ſhould imploy a ſoldier, or a woman to act for him; for ſoldiers are not permited to appear in any cauſe, even in behalf of a father, a mother, or a wife, altho' they obtain the ſanction of an imperial reſcript; but they are allowed to act in their own affairs, without offending againſt military diſcipline. But we have put a ſtop to the exceptions of infamy, which were formerly made, both againſt proctors and their conſtituents, having obſerved them to be little practiſed, and fearing, leſt by means of ſuch altercations, a diſquiſition into the merits of cauſes ſhould be retarded.*

TITULUS

TITULUS DECIMUS-QUARTUS.

De replicationibus.

De replicatione.

INterdum evenit, ut exceptio, quæ prima facie juſta videtur, tamen inique noceat: quod cum accidit, alia allegatione opus eſt, adjuvandi actoris gratia: quæ replicatio vocatur; quia per eam repſicatur atque reſolvitur jus exceptionis: veluti cum pactus eſt aliquis cum debitore ſuo, ne ab eo pecuniam petat, deinde poſtea in contrarium pacti ſunt, id eſt, ut creditori petere liceat: ſi creditor agat, et excipiat debitor, ut ita demum condemnetur, ſi non convenerit, ne eam pecuniam creditor petat, nocet ei exceptio: convenit enim ita. Namque nihilominus hoc verum manet, licet poſtea in contrarium pacti ſint. Sed quia iniquum eſt, creditorem excludi, replicatio ei dabitur ex poſteriore pacto convento.

Sometimes an exception, which appears at the firſt view to be valid, is nevertheleſs not ſo: and, when this happens, there is a neceſſity for an additional allegation in aid of the plaintiff, and this is called a replication, becauſe the force of the exception is replicated, *that is, unfolded, and deſtroyed by it: as if a creditor ſhould covenant with his debtor not to ſue him, and it ſhould afterwards be agreed between them, that the creditor may ſue, in conſequence of which agreement the creditor brings an action, to which the debtor excepts, alleging the agreement of his creditor not to ſue him; in this caſe, the exception would be of weight; for, as ſuch an agreement was entered into, it remains good, altho' a ſubſequent one was afterwards made to a contrary effect: but, as it would be unjuſt, that a creditor ſhould be concluded by the exception, he is allowed to make a replication, by reaſon of the ſubſequent compact.*

De duplicatione.

§ I. Rurſus interdum evenit, ut replicatio, quæ prima facie juſta eſt, inique noceat: quod cum accidit, alia allegatione opus eſt, adjuvandi rei gratia; quæ duplicatio vocatur.

§ 1. *It alſo ſometimes happens, that a replication at firſt appears to be concludent, tho' it is not ſo in reality; and, when it ſo happens, then another allegation, called a duplication, muſt be offered in ſupport of the defendent.*

De triplicatione.

§ II. Et, ſi rurſus ea prima facie juſta videatur, ſed propter aliquam cauſam actori inique noceat, rurſus alia allegatione opus eſt, qua actor adjuvetur; quæ dicitur triplicatio.

§ 2. *And*

§ 2. *And when a duplication carries with it an appearance of juſtice, but is, upon ſome account, injurious to the party agent, he may alſo, in his turn, give another allegation, which is termed a triplication.*

De cæteris exceptionibus.

§ III. Quarum omnium exceptionum uſum interdum ulterius, quam diximus, varietas negotiorum introducit, quas omnes apertius ex digeſtorum latiore volumine facile eſt cognoſcere.

§ 3. *But the great variety of buſineſs, which continually occurs, often extends the uſe of all theſe exceptions, much farther, than we have mentioned; but of thoſe a fuller knowlege may be obtained by a peruſal of the larger volumes of the digeſts.*

Quæ exceptiones fidejuſſoribus proſunt vel non.

§ IV. Exceptiones autem, quibus debitor defenditur, plerumque accommodari ſolent etiam fidejuſſoribus ejus; et recte: quia, quod ab iis petitur, id ab ipſo debitore peti videtur: quia mandati judicio redditurus eſt eis, quod ei pro eo ſolverint. Qua ratione, et ſi de non petenda pecunia pactus quis cum eo fuerit, placuit, perinde ſuccurrendum eſſe per exceptionem pacti conventi illis quoque, qui pro eo obligati ſunt, ac ſi etiam cum ipſis pactus eſſet, ne ab eis pecunia peteretur. Sane quædam exceptiones non ſolent his accommodari. Ecce enim debitor, ſi bonis ſuis ceſſerit, et cum eo creditor experiatur, defenditur per exceptionem, *ſi bonis ceſſerit*. Sed hæc exceptio fidejuſſoribus non datur: ideo ſcilicet, quia, qui alios pro debitore obligat, hoc maxime proſpicit, ut, cum facultatibus lapſus fuerit debitor, poſſit ab iis, quos pro eo obligavit, ſuum conſequi.

§ 4. *The exceptions, by which a debtor may defend himſelf, are generally allowed to be uſed by his bondſmen; and this is a right practice; for a demand, made upon them, is, as it were, a demand upon the debtor himſelf, who is compelable by an action of mandate to pay over to his ſureties whatever they have been obliged to pay upon his account; and therefore, if a creditor hath covenanted with his debtor not to ſue him, the bondſmen of ſuch debtor may be aided by an exception of compact, in the ſame manner, as if the promiſe had been made expreſsly to them. But there are ſome exceptions, which can not be made uſe of in behalf of ſureties; for altho', when a debtor hath made a ceſſion of his goods, he may defend himſelf by alleging that ceſſion, as an exception to a ſuit brought by a creditor, yet the ſame exception cannot be alleged by the bondſmen; and the reaſon is evident; for whoever demands ſureties hath always this principally in view, that he may be able to recover his debt from thoſe ſureties, in caſe of failure in the principal debtor.*

TITULUS DECIMUS-QUINTUS.

De interdictis.

D. xliii. T. 1. C. viii. T. 1.

Continuatio et definitio.

SEquitur, ut diſpiciamus de interdictis, ſeu actionibus, quæ pro his exercentur. Erant autem interdicta formæ atque conceptiones verborum, quibus prætor aut jubebat aliquid fieri, aut fieri prohibebat; quod tunc maxime fiebat, cum de poſſeſſione aut quaſi poſſeſſione inter aliquos contendebatur.

We are now led to treat of interdicts, or of thoſe actions, which ſupply their place. Interdicts were certain forms of words, by which the prætor either commanded or prohibited ſomething to be done; and theſe were chiefly uſed, when any contention aroſe concerning poſſeſſion, or quaſi-*poſſeſſion.*

Seu actionibus, quæ pro his exercentur.] Interdicts are wholly out of uſe among civilians, ſo that at this day there is no difference between interdicts and actions. See *the laſt ſection of this title.* And formerly the Roman prætors uſed them chiefly to ſuppreſs tumultuary and ſudden violence, in regard to poſſeſſions; but, in theſe caſes, our anceſtors were accuſtomed to delegate juſtices of *oyer* and *terminer*, or juſtices of aſſiſe; and theſe, not to determine all cauſes at ſet times, as now, but upon every particular emergency, as ſoon as it firſt aroſe; but ſuch affairs are now managed by judicial writs, or by the aſſiſtence of the ſheriff and juſtices of peace in every county. vide *Bracton*, *Britton*, and *Fleta*, in their proper places. *Cowel's inſt. h. l.*

Diviſio prima.

§ I. Summa autem diviſio interdictorum hæc eſt, quod aut prohibitoria ſunt, aut reſtitutoria, aut exhibitoria. Prohibitoria ſunt, quibus prætor vetat aliquid fieri; veluti vim ſine vitio poſſidenti, vel mortuum inferenti, quo ei jus erat inferendi; vel in ſacro loco ædificari, vel in flumine publico ripave ejus aliquid fieri, quo pejus navigetur. Reſtitutoria ſunt, quibus reſtitui aliquid jubet: veluti bonorum poſſeſſori poſſeſſionem eorum, quæ quis pro hærede, aut pro poſſeſſore, poſſidet ex ea hæreditate: aut cum jubet, ei, qui vi de poſſeſſione dejectus ſit, reſtitui poſſeſſionem. Exhibitoria ſunt, per quæ jubet exhiberi; veluti eum, cujus de libertate agitur, aut libertum, cui patronus operas indicere velit; aut parenti liberos, qui in poteſtate ejus ſunt. Sunt tamen, qui putent, interdicta ea proprie vocari, quæ prohibitoria ſunt; quia interdicere ſit denuntiare et prohibere: reſtitutoria autem et exhibitoria proprie decreta vocari. Sed tamen obtinuit, omnia interdicta appellari; quia inter duos dicuntur.

§ 1. *The firſt diviſion of them is into prohibitory, reſtoratory, and exhibitory interdicts; the prohibitory are thoſe, by which the prætor prohibits ſomething to be done,*

done, as when he forbids force to be uſed againſt a lawful poſſeſſor; or againſt a perſon, who is burying another, where he had a right: or when he forbids an edifice to be raiſed in a ſacred place, or hinders a work from being erected in a public river, or on the banks of it, which may render it leſs navigable. The reſtoratory are thoſe interdicts, by which the prætor orders ſomething to be reſtored, as the poſſeſſion of goods to the univerſal ſucceſſor, who has been kept out of poſſeſſion by one, who had no right; or when the prætor commands poſſeſſion to be reſtored to him, who hath been forcibly ejected. And the exhibitory interdicts are thoſe, by which the prætor commands ſome exhibit to be made, as of a ſlave, for example, concerning whoſe liberty a cauſe is depending; or of a freed-man, from whom a patron would exact the ſervice due to him; or of children to their parent, under whoſe power they are. Some nevertheleſs imagine, that interdicts can with propriety be only prohibitory, becauſe the word interdicere *ſignifies to* denounce *and* prohibit --- *and that the reſtoratory and exhibitory interdicts might more properly be called decrees; yet it hath obtained by uſage, that they ſhould all be termed interdicts, becauſe they are pronounced between two,* [inter duos dicuntur,] *the demandant and the poſſeſſor.*

Diviſio ſecunda.

§ II. Sequens diviſio interdictorum hæc eſt, quod quædam adipiſcendæ poſſeſſionis cauſa comparata ſunt, quædam retinendæ, quædam recuperandæ.

§ 2. *The ſecond diviſion of interdicts is into thoſe, which are given for the acquiſition, the retention, or the recovery of a poſſeſſion.*

De interdictis adipiſcendæ.

§ III. Adipiſcendæ poſſeſſionis cauſa interdictum accommodatur bonorum poſſeſſori, quod appellatur, *Quorum bonorum*; ejuſque vis et poteſtas hæc eſt, ut, quod ex iis bonis quiſque, quorum poſſeſſio alicui data eſt, pro hærede aut pro poſſeſſore poſſideat, id ei, cui bonorum poſſeſſio data eſt, reſtituere debeat. Pro hærede autem poſſidere videtur, qui putat ſe hæredem eſſe. Pro poſſeſſore is poſſidet, qui nullo jure rem hæreditariam, vel etiam totam hæreditatem, ſciens ad ſe non pertinere, poſſidet. Ideo autem adipiſcendæ poſſeſſionis vocatur interdictum, quia ei tantum utile eſt, qui nunc primum conatur adipiſci poſſeſſionem. Itaque, ſi quis adeptus poſſeſſionem amiſerit eam, hoc interdictum ei inutile eſt. Interdictum quoque Salvianum adipiſcendæ poſſeſſionis cauſa comparatum eſt: eoque utitur dominus fundi de rebus coloni, quas is pro mercedibus fundi pignori futuras pepigiſſet.

§ 3. *An interdict for the acquiſition of poſſeſſion is given to him, whom the prætor appoints to be the poſſeſſor of the goods of a deceaſed perſon. This interdict is called* quorum bonorum, *and the effect of it is, that it obliges all perſons, who retain goods in their hands as heirs or poſſeſſors, to reſtore ſuch goods to him, to whom the poſſeſſion of them hath been commited by the magiſtrate: and note, that he is reputed to poſſeſs, as heir, who thinks and takes himſelf ſo to be; and that he is deemed to poſſeſs, as poſſeſſor, who without authority retains a part, or the whole, of an inheritance,*

ritance, knowing that the poſſeſſion does not belong to him. An interdict of acquiſition is ſo called, becauſe it is uſeful to him only, who firſt *indeavors to acquire the poſſeſſion; and therefore this interdict would be uſeleſs to any one, who had once acquired a poſſeſſion, but afterwards loſt it. The interdict, called the* Salvian *interdict, is alſo appointed for the acquiſition of poſſeſſion; and is uſed by the proprietors of farms, in order to acquire the goods, which their tenents have pledged and ingaged, as a ſecurity for the payment of rent.*

Salvianum] This interdict is ſo called from *Salvius Julianus*, who drew it up by the order of *Adrian*, the Emperor. *vid. ff.* 43. *t.* 33. *et* Menagii *juris civ. amœnitates. p.* 132.

De interdictis retinendæ.

§ IV. Retinendæ poſſeſſionis cauſa comparata ſunt interdicta, *uti poſſidetis, et utrubi*; cum ab utraque parte de proprietate alicujus rei controverſia ſit, et ante quæratur, uter ex litigatoribus poſſideat, et uter petere debeat. Namque, niſi ante exploratum fuerit, utrius eorum poſſeſſio ſit, non poteſt petitoria actio inſtitui: quia et civilis et naturalis ratio facit, ut alius poſſideat, et alius à poſſidente petat. Et, quia longe commodius eſt et potius poſſidere, quam petere, ideo plerumque, et fere ſemper, ingens exiſtit contentio de ipſa poſſeſſione. Commodum autem poſſidenti in eo eſt, quod, etiam ſi ejus res non ſit, qui poſſidet, ſi modo actor non potuerit ſuum eſſe probare, remanet in ſuo loco poſſeſſio: propter quam cauſam, cum obſcura ſunt utriuſque jura, contra petitorem judicari ſolet. Sed interdicto quidem *uti poſſidetis* de fundi vel ædium poſſeſſione contenditur: *utrubi* vero interdicto de rerum mobilium poſſeſſione: quorum vis ac poteſtas plurimam inter ſe differentiam apud veteres habebat: nam *uti poſſidetis* interdicto is vincebat, qui interdicti tempore poſſidebat; ſi modo nec vi, nec clam, nec precario, nactus fuerat ab adverſario poſſeſſionem: etiamſi alium vi expulerat, aut clam arripuerat alienam poſſeſſionem, aut precario rogaverat aliquem, ut ſibi poſſidere liceret. *Utrubi* vero interdicto is vincebat, qui majore parte anni nec vi, nec clam, nec precario, ab adverſario poſſidebat. Hodie tamen aliter obſervatur: nam utriuſque interdicti poteſtas (quantum ad poſſeſſionem pertinet) exæquata eſt, ut ille vincat et in re ſoli, et in re mobili, qui poſſeſſionem nec vi, nec clam, nec precario, ab adverſario, litis conteſtatæ tempore, detinet.

§ 4. *The interdicts* uti poſſidetis *and* utrubi *have been introduced for the ſake of retaining poſſeſſion; for, when there is a controverſy between two parties concerning property, it is neceſſary to inquire, which of them is in poſſeſſion, that it may be known, who ought to be the demandant; for, till the poſſeſſion is aſcertained, an action of demand can not be inſtituted; and natural reaſon teaches us, that, when one of the parties is in poſſeſſion, the other muſt of courſe be the demandant in the ſuit: but, as it is by far more advantageous to be the poſſeſſor, than the demandant, there is generally great contention for the poſſeſſion; for altho' the poſſeſſor is not in reality the true proprietor, yet the poſſeſſion will ſtill remain in him, if the plaintiff does not prove the thing in litigation to be his own: and therefore, when the rights of parties are not clear,*

clear, the ſentence is always againſt the demandant. By the interdict uti poſſidetis, *the poſſeſſion of a farm or houſe is contended for; and, by the interdict* utrubi, *the poſſeſſion of things moveable is diſputed. Theſe interdicts antiently differed much in their force and effects; for, by the interdict* uti poſſidetis, *that party, who was in poſſeſſion at the time of bringing the interdict, prevailed, if he had not obtained the poſſeſſion from his adverſary, by force, clandeſtinely, or precariouſly; but it was not material in what manner the poſſeſſor had obtained the poſſeſſion from any other perſon: and, by the interdict* utrubi, *that party prevailed, who had been in poſſeſſion for the greateſt part of the year preceeding the conteſt, if he had not acquired that poſſeſſion clandeſtinely, precariouſly, or by force. But the preſent practice is nevertheleſs otherwiſe; for the power of both interdicts in regard to poſſeſſion is now made equal; ſo that in any cauſe, inſtituted either for things moveable or immoveable, that party prevails, who was in poſſeſſion at the time of conteſting ſuit, if it is not made apparent, that he gained ſuch poſſeſſion by force, by clandeſtine means, or precariouſly.*

Uti poſſidetis.] *vid. ff.* 43. *t.* 17. *Ulp. lib.* 69. Utrubi.] *vid. ff.* 43. *t.* 31. De utrubi. *ad edictum. Cod.* 8. *t.* 6.

De retinenda et acquirenda poſſeſſione.

§ V. Poſſidere autem videtur quiſque, non ſolum ſi ipſe poſſideat, ſed et ſi ejus nomine aliquis in poſſeſſione ſit, licet is ejus juri ſubjectus non ſit: qualis eſt colonus et inquilinus. Per eos quoque, apud quos depoſuerit quis, aut quibus commodaverit, ipſe poſſidere videtur: et hoc eſt, quod dicitur, retinere poſſeſſionem poſſe aliquem per quemlibet, qui ejus nomine ſit in poſſeſſione. Quinetiam animo quoque ſolo retineri poſſeſſionem placet: id eſt, ut, quamvis neque ipſe ſit in poſſeſſione, neque ejus nomine alius, tamen ſi non relinquendæ poſſeſſionis animo, ſed poſtea reverſurus inde deceſſerit, retinere poſſeſſionem videatur. Adipiſci vero poſſeſſionem per quos aliquis poteſt, ſecundo libro expoſuimus. Nec uila dubitatio eſt, quin animo ſolo adipiſci poſſeſſionem nemo poſſit.

§ 5. *A man is regarded as a poſſeſſor, not only when he is himſelf in poſſeſſion, but alſo when any other, who is not under his power, holds poſſeſſion in his name; as for inſtance, a farmer, or a tenent. Any perſon may alſo poſſeſs by means of thoſe, to whom he hath commited the thing in litigation, either as a depoſit or a loan; and this is what is meant by ſaying, that a poſſeſſion may be retained by any one, by means of another, who poſſeſſes in his name. It is moreover held, that a poſſeſſion may be retained, by the mere intention only; for, altho' a man is neither in poſſeſſion himſelf, nor any other for him, but has quited the poſſeſſion of certain lands with an intent to return to them again, he ſhall nevertheleſs be deemed to continue in poſſeſſion. We have already explained, in our ſecond inſtitute, by what perſons any man may acquire poſſeſſion; and, altho' it may be retained* ſolo animo, *that is, by an intention only, yet it is indubitable, that a mere intention is not ſufficient for the acquiſition of poſſeſſion.*

De interdicto recuperandæ, et affinibus remediis.

§ VI. Recuperandæ poſſeſſionis cauſa ſolet interdici, ſi quis ex poſſeſſione fundi vel ædium vi dejectus fuerit. Nam ei proponitur interdictum

dictum *unde vi*: per quod is, qui dejecit, cogitur ei reſtituere poſſeſſionem, licet is ab eo, qui vi dejecit, vi, clam, vel precario, poſſideat. Sed ex conſtitutionibus ſacris, (ut ſupra diximus,) ſi quis rem per vim occupaverit, ſiquidem in bonis ejus eſt, dominio ejus privatur: ſi aliena, poſt ejus reſtitutionem, etiam æſtimationem rei dare vim paſſo compellitur. Qui autem aliquem de poſſeſſione per vim dejecerit; tenetur lege Julia de vi privata, aut de vi publica. Sed de vi privata, ſi ſine armis vim fecerit; ſin autem armis eum de poſſeſſione vi expulerit, de vi publica tenetur. Armorum autem appellatione non ſolum ſcuta et gladios et galeas, ſed et fuſtes et lapides, ſignificari intelligimus.

§ 6. *The interdict for the recovery of poſſeſſion is generally made uſe of, when any perſon hath been forcibly ouſted from the poſſeſſion of his houſe or eſtate; for the party ouſted is then intituled to the interdict* unde vi, *by which the intruder is compeled to reſtore him to poſſeſſion, altho' he, who had been thus forcibly ouſted, was himſelf in poſſeſſion by clandeſtine means, by force, or precariouſly. But, as we have before obſerved, it is provided by the imperial conſtitutions, that, whenever any man ſeizes a thing by force, if it is his own, he ſhall loſe his property in it; and, if it belongs to another, he ſhall be compeled not only to make reſtitution, but alſo to pay the full value to the party, who ſuffered the force. But whoever ouſts another of poſſeſſion by force, is likewiſe ſubject to the law* Julia, de vi privata, *or* de vi publica: --- *if the ſeiſing or intruſion was affected without weapons, then the offender is only liable to the law* de vi privata; *but, if it was effected by an armed force, he is then ſubject to the law* de vi publica. *We comprehend not only ſhields, ſwords, and helmets under the term arms, but alſo clubs and ſtones.*

Sed ex conſtitutionibus.] *vid. Cod.* 8. *t.* 4. Tenetur lege Julia.] *vid. ff.* 43. *t.* 16. *unde vi.* *ff.* 47. *t.* 1.

Diviſio tertia.

§ VII. Tertia diviſio interdictorum eſt, quod aut ſimplicia ſunt, aut duplicia. Simplicia ſunt, veluti in quibus alter actor, alter reus eſt: qualia ſunt omnia reſtitutoria, aut exhibitoria. Nam actor is eſt, qui deſiderat aut exhiberi aut reſtitui: reus autem is eſt, à quo deſideratur, ut reſtituat, aut exhibeat: prohibitoriorum autem interdictorum alia ſimplicia ſunt, alia duplicia. Simplicia ſunt, veluti cum prætor prohibet in loco ſacro, vel in flumine publico, ripave ejus, aliquid fieri. Nam actor eſt, qui deſiderat, ne quid fiat: reus eſt, qui aliquid facere conatur. Duplicia ſunt, veluti *uti poſſidetis* interdictum, et *utrubi*. Ideo autem duplicia vocantur, quia par utriuſque litigatoris in his conditio eſt: nec quiſquam præcipue reus vel actor intelligitur: ſed unuſquiſque tam rei, quam actoris, partes ſuſtinet.

§ 7. *The third diviſion of interdicts is into ſimple and double interdicts: the ſimple are thoſe, in which there is both a plaintiff and a defendent; and of this ſort are all reſtoratory and exhibitory interdicts; for the plaintiff, or demandant, is he, who requires ſomething to be exhibited or reſtored; and the defendent is he, from whom the exhibition or reſtitution is required. But of the prohibitory interdicts ſome are ſimple, ſome double;*

double; they are ſimple, when the prætor forbids ſomething to be done in a ſacred place, on a public river, or upon the banks of it; for the demandant is he, who deſires, that ſome act ſhould not be done, and the defendent is he, who indeavors to do it. The interdicts uti poſſidetis *and* utrubi *are inſtances of the double interdicts; and they are called double, becauſe in theſe the condition of either litigant is equal, the one not being underſtood to be more particularly the plaintiff or the defendent, than the other; inaſmuch as each ſuſtains the part of both.*

De ordine et vetere exitu.

§ VIII. De ordine et vetere exitu interdictorum ſupervacuum eſt hodie dicere. Nam quoties extra ordinem jus dicitur, (qualia ſunt hodie omnia judicia,) non eſt neceſſe reddi interdictum: ſed perinde judicatur ſine interdictis, ac ſi utilis actio ex cauſa interdicti reddita fuiſſet.

§ 8. *It would be ſuperfluous at this day to ſpeak of the order, and antient effect of interdicts: for, when judgments are extraordinary, (and at preſent all judgments are ſo,) an interdict is rendered unneceſſary; and judgments are therefore now delivered without interdicts, in the ſame manner, as if a beneficial action was given in conſequence of an interdict.*

TITULUS DECIMUS-SEXTUS.

De pœna temere litigantium.

De pœnis in genere.

NUNC admonendi ſumus, magnam curam egiſſe eos, qui jura ſuſtinebant, ne facile homines ad litigandum procederent: quod et nobis ſtudio eſt. Idque eo maxime fieri poteſt, quod temeritas tam agentium, quam eorum, cum quibus agitur, modo pecuniara pœna, modo jurisjurandi religione, modo infamiæ metu coerceatur.

Our legiſlators and magiſtrates have ever been careful to hinder mankind from entering into raſh and litigious contentions; and we alſo are ſtudious to effect the ſame purpoſe. And, that ſuch ſuits may be the better prevented, the raſhneſs both of plaintiffs and defendents hath been properly reſtrained, by pecuniary puniſhments, the coertion of an oath, and the fear of infamy.

De jurejurando et pœna pecuniaria.

§ I. Ecce enim jusjurandum omnibus, qui conveniuntur, ex conſtitutione noſtra defertur: nam reus non aliter ſuis allegationibus utitur, niſi prius juraverit, quod, putans ſe bona inſtantia uti, ad contradicendum pervenit. At adverſus inficiantes, ex quibuſdam cauſis dupli actio conſtituitur; veluti ſi damni injuriæ, aut legatorum locis venerabilibus relictorum, nomine agatur. Statim autem ab initio pluris quam ſimpli

eſt

eſt actio; veluti furti manifeſti, quadrupli; nec manifeſti, dupli. Nam ex his, et aliis quibuſdam cauſis, ſive quis neget, ſive fateatur, pluris quam ſimpli eſt actio. Item actoris quoque calumnia coercetur: nam etiam actor pro calumnia jurare cogitur ex noſtra conſtitutione, quod non calumniandi animo litem moviſſet, ſed exiſtimando, ſe bonam cauſam habere. Utriuſque etiam partis advocati jusjurandum ſubeunt, quod alia noſtra conſtitutione comprehenſum eſt. Hæc autem omnia pro veteri calumniæ actione introducta ſunt; quæ in deſuetudinem abiit; quia in partem decimam litis actores multabat; quod nuſquam factum eſſe invenimus: ſed pro his introductum eſt et præfatum jusjurandum, et ut improbus litigator et damnum et impenſas litis inferre adverſario ſuo cogatur.

§ 1. *By virtue of one of our conſtitutions, an oath muſt be adminiſtered to every man, againſt whom an action is brought; for a defendent is not permited to plead, till he hath firſt ſworn, that he proceeds as a contradictor, upon a firm belief, that his cauſe is good. But actions lie, in particular caſes, for double and triple value againſt thoſe, who have given a negative iſſue; as when a ſuit is commenced on account of injurious damage, or for a legacy, left to a ſacred place, as a church, hoſpital,* &c. *There are alſo actions, upon which more than the ſimple value is recoverable at the time of their commencement; as upon an action of theft* manifeſt, *which is for four-fold the value; and upon an action of theft* not manifeſt, *which lies for double the value; becauſe in theſe, as well as in ſome other caſes, the action is at firſt given for more than the ſimple value, whether the defendent denies or confeſſes the charge brought againſt him. But the calumny of the plaintiff is alſo under reſtraint; for he too is compeled by our conſtitution to ſwear, that he did not commence the ſuit with an intention to calumniate; but upon a thorough confidence, that he had a good cauſe: and, what is more, the advocates on both ſides are likewiſe compelable to take a ſimilar oath, the ſubſtance of which is ſet forth in another of our conſtitutions. This practice hath been introduced in the place of the antient action of calumny, which compeled the plaintiff to pay the tenth part of his demand as a puniſhment; but this action is now diſuſed; and, inſtead of it, we have introduced the before-mentioned oath, and have ordained, that every raſh litigant, who hath failed in his proof, ſhall be compeled to pay his adverſary the damages and coſts of ſuit.*

Ex conſtitutione.] The oath of calumny was in uſe long before the reign of *Juſtinian*, as appears from many paſſages in the digeſts; *ff.* 12. *t.* 2. *l.* 44. *ff.* 12. *t.* 2. *ll.* 16. 34. *ff.* 39. *t.* 2. *l.* 13. § 3. *Qui damni infecti caveri ſibi poſtulat, prius de calumnia jurare debet.* And in ſection 4. of the ſame book are theſe words — *Si alieno nomine caveri mihi damni infecti poſtulem, jurare debeo,* NON CALUMNIÆ CAUSA ID EUM, CUJUS NOMINE CAUTUM POSTULO, FUISSE POSTULATURUM. *Ulpian.*

But the oath ſeems afterwards to have fallen into deſuetude, and to have been only revived by the conſtitution refered to; part of which is conceived in the following terms. *Actor quidem juret,* NON CALUMNIANDI ANIMO LITEM SE MOVISSE SED ESTIMANDO BONAM CAUSAM HABERE.

Reus autem non aliter ſuis allegationibus utatur, niſi prius et ipſe juraverit; — QUOD, PUTANS SE BONA INSTANTIA UTI, AD RELUCTANDUM PERVENERIT. *Cod.* 2. *t.* 59. *l.* 2.

The canon law permits even a proctor to ſwear *in animam domini ſui.* vid. *decret. Greg.* ix. *lib.* 2. *t.* 7. And this was formerly the practice in all the eccleſiaſtical courts in *England.* vid. *ord. judiciorum. tit.* 99. *and* 110. — *canon* 132. — But the oath of calumny is now diſuſed not only in *England,* but alſo in thoſe countries, where the canon law is in full force, and where the civil law is the law of the land. *vid. La juriſprudence du code conferée avec les ordonnances royaux*

royaux de France. tom. 1. *p.* 296. —— *Groenw. de ll. abr. in 4tam. inſt. t.* 16.—*Philiberti Bugnion ll. abr. tractatus lib.* 1. *cap.* 3.

Alia noſtrâ conſtitutione.] *vid. Cod.* 3. *t.* 2. *l.* 14. et novellam. *Patroni autem cauſarum*, &c.

De infamia.

§ II. Ex quibuſdam judiciis damnati ignominioſi fiunt; veluti furti, vi bonorum raptorum, injuriarum, de dolo; item tutelæ, mandati, depoſiti, directis, non contrariis actionibus; item pro ſocio; quæ ab utraque parte directa eſt: et ob id quilibet ex ſociis, eo judicio damnatus, ignominia notatur. Sed furti quidem, aut vi bonorum raptorum, aut injuriarum, aut de dolo, non ſolum damnati notantur ignominia, ſed et pacti: et recte: plurimum enim intereſt, utrum ex delicto aliquis, an ex contractu, debitor ſit.

§ 2. *In ſome caſes the parties condemned become infamous, as in actions of theft, rapin, injury, or fraud. The parties condemned are likewiſe rendered ignominious, in an action of tutelage, mandate, or depoſit, if it is a* direct, *and not a contrary, action. An action of partenerſhip has alſo the ſame effect; for it is direct in regard to all the parteners; and therefore any one of them, who is condemned in ſuch action, is branded with infamy. But not only thoſe, who have been condemned in an action of theft, rapine, injury, or fraud, are rendered infamous; but thoſe alſo, who have bargained to prevent a criminal proſecution; and this is a right practice; for there is a wide difference between a debtor, on account of a crime, and a debtor upon contract.*

Ignominioſi fiunt.] *vid. ff.* 3. *t.* 2. *Cod.* 2. *t.* 12.

Non contrariis actionibus.] " Nam in con- " trariis judiciis de dolo aut perfidia non agitur, " ſed tantum de calculo et ſupputatione ejus, " quod contrario judicio agenti abeſt. *Vinn.*

De in jus vocando.

§ III. Omnium autem actionum inſtituendarum principium ab ea parte edicti proficiſcitur, qua prætor edicit de in jus vocando. Utique enim in primis adverſarius in jus vocandus eſt, id eſt, ad eum vocandus, qui jus dicturus ſit. Qua parte prætor parentibus et patronis, item parentibus liberiſque patronorum et patronarum, hunc præſtat honorem, ut non aliter liceat liberis libertiſque eos in jus vocare, quam ſi id ab ipſo prætore poſtulaverint et impetraverint.. Et, ſi quis aliter vocaverit, in eum pœnam ſolidorum quinquaginta conſtituit.

§ 3. *All actions take their commencement from that part of the prætor's edict, in which he treats* de in jus vocando, *that is, of calling perſons into judgment: for the firſt ſtep to be taken, in all matters of controverſy, is to cite or call the adverſe party to appear before the judge, who is to determine the cauſe. And, in the ſame part of the edict, the prætor hath treated parents and patrons, and even the children of patrons and patroneſſes, with ſo great a reſpect, that he does not ſuffer them to be called into judgment by their children or their freedmen, until application hath been firſt made to him, and leave obtained: and, if any man preſumes to cite a parent, a*

patron, or the children of a patron, without ſuch previous permiſſion, he is ſubject to a penalty of fifty ſolidi.

De in jus vocando.] *vid. ff. 2. t. 4. Cod. 2. t. 2.*

TITULUS DECIMUS-SEPTIMUS.

De officio judicis.

De officio judicis in genere.

SUpereſt, ut de officio judicis diſpiciamus. Et quidem in primis illud obſervare debet judex, ne aliter judicet, quam legibus, aut conſtitutionibus, aut moribus, proditum eſt.

It now remains, that we ſhould inquire into the office and duty of a judge. And it is certain, that it ought to be his principal care never to determine otherways, than the laws, the conſtitutions, or the cuſtoms and uſages, direct.

De judicio noxali.

§ I. Ideoque, ſi noxali judicio aditus eſt, obſervare debet, ut, ſi condemnandus videtur dominus, ita debeat condemnare: *Publium Mævium Lucio Titio in decem aureos condemno; aut noxam dedere.*

§ 1. *And therefore, if a ſuit is commenced by a noxal action, the judge ought always to obſerve the following form of condemnation, if the defendent deſerves to be condemned:* e. g. I condemn PUBLIUS MÆVIUS to pay LUCIUS TITIUS ten *aurei*, or to deliver up the ſlave, who did the damage.

De actionibus realibus.

§ II. Et, ſi in rem actum ſit coram judice, ſive contra petitorem judicaverit, abſolvere debet poſſeſſorem: ſive contra poſſeſſorem, jubere ei debet, ut rem ipſam reſtituat cum fructibus. Sed, ſi poſſeſſor neget, in præſenti ſe reſtituere poſſe, et ſine fruſtratione videbitur tempus reſtituendi cauſa petere, indulgendum eſt ei; ut tamen de litis æſtimatione caveat cum fidejuſſore, ſi intra tempus, quod ei datum eſt, non reſtituerit. Et, ſi hæreditas petita ſit, eadem circa fructus interveniunt, quæ diximus intervenire de ſingularum rerum petitione. Illorum autem fructuum, quos culpa ſua poſſeſſor non perceperit, ſive illorum, quos perceperit, in utraque actione eadem ratio pene habetur, ſi prædo fuerit. Si vero bonæ fidei poſſeſſor fuerit, non habetur ratio neque conſumptorum, neque non perceptorum. Poſt inchoatam autem petitionem

petitionem etiam illorum fructuum ratio habetur, qui culpa poſſeſſoris percepti non ſunt, vel percepti conſumpti ſunt.

§ 3. *When a cauſe, commenced upon a real action, is brought before a judge for his determination, and he thinks proper to pronounce againſt the demandant, the poſſeſſor ought then to be acquited; but, if the judge thinks it juſt to condemn the poſſeſſor, the party condemned muſt be admoniſhed to reſtore the very thing, which was in diſpute, together with all it's produce. But, if the poſſeſſor alleges, that he is unable to make an immediate reſtitution, and petitions for a longer time, without any ſeeming intention to fruſtrate the ſentence, he is to be indulged; provided always, that he gives caution by a ſufficient bondſman, for the full payment of the condemnation and coſts of ſuit, if he ſhould fail to make reſtitution within the time appointed. And, if an inheritance is ſued for, a judge ought to determine juſt in the ſame manner in regard to the profits, as he would in a ſuit for ſome particular thing only; for, if the defendent appears to have been a poſſeſſor* in mala fide, *then almoſt the ſame reaſoning prevails in both actions in regard to the profits, whether they were taken by the poſſeſſor, or, thro' negligence, not taken by him: but, if the defendent was a* bona fide *poſſeſſor, then no account is expected, either of fruits conſumed, or of fruits not gathered, before the conteſtation of ſuit; yet note, that, from the time of conteſtation, all fruits muſt be accounted for, whether they were gathered and uſed, or left ungathered, thro' the negligence of the poſſeſſor.*

De actione ad exhibendum.

§ III. Si ad exhibendum actum fuerit, non ſufficit, ſi exhibeat rem is, cum quo actum eſt; ſed opus eſt, ut etiam rei cauſam debeat exhibere, id eſt, ut eam cauſam habeat actor, quam habiturus eſſet, ſi, cum primum ad exhibendum egiſſet, exhibita res fuiſſet. Ideoque, ſi inter moras exhibendi uſucapta ſit res à poſſeſſore, nihilominus condemnabitur. Præterea fructuum medii temporis, id eſt, ejus, quod poſt acceptum ad exhibendum judicium, ante rem judicatam, interceſſerit, rationem habere debet judex. Quod ſi neget reus, cum quo ad exhibendum actum eſt, in præſenti ſe exhibere poſſe, et tempus exhibendi cauſa petat, idque ſine fruſtratione poſtulare videatur, dari ei debet, ut tamen caveat, ſe reſtituturum. Quod ſi neque ſtatim juſſu judicis rem exhibeat, neque poſtea ſe exhibiturum caveat, condemnandus ſit in id, quod actoris intererat, ſi ab initio res exhibita eſſet.

§ 3. *If a man proceeds by an action* ad exhibendum, *it is not ſufficient, that the defendent ſhould exhibit the thing in queſtion, but he muſt alſo be anſwerable for all profits and emoluments accruing from it; that the plaintiff may be in the ſame ſtate, as if his property had been reſtored to him at the time, when he firſt brought his action: and therefore, if the poſſeſſor, during his delay to ſurrender the thing in diſpute, ſhall gain a preſcriptive title to it, yet ſuch poſſeſſor ſhall nevertheleſs be condemned to reſtitution; for he ſhall not be allowed to avail himſelf of his own delay. And farther, it is the duty of the judge to take an account of the profits of the middle time, that is, of the time between conteſtation and ſentence. But, if the defendent declares, that he is not able inſtantly to produce the thing adjudged, and prays a further*

ther time, without any appearance of affecting a delay, a term ought to be assigned him, upon his giving caution to make restitution. But, if he neither obeys the commands of the magistrate in instantly producing the thing adjudged, nor in giving a sufficient caution for the production of it at a future day, he must then be condemned to pay the full damages, which the demandant hath sustained by not having the thing delivered to him at the commencement of the suit.

Familiæ erciscundæ.

§ IV. Si familiæ erciscundæ judicio actum sit, singulas res singulis hæredibus adjudicare debet: et, si in alterius persona prægravare videatur adjudicatio, debet hunc invicem cohæredi certa pecunia (sicuti jam dictum est) condemnare. Eo quoque nomine cohæredi quisque suo condemnandus est, quod solus fructus hæreditarii fundi perceperit, aut rem hæreditariam corruperit, aut consumpserit. Quæ quidem similiter inter plures quoque quam duos cohæredes subsequuntur.

§ 4. *When a suit is commenced by the action* familiæ erciscundæ, *for the partition of an inheritance, it is the duty of the judge to decree to each heir his respective portion: and, if the partition, when made, is more advantageous to the one than to the other, then ought the judge, as we have before observed, to oblige him, who has the largest part to make a full recompense in money to his coheir: it therefore follows, that every coheir, who hath taken the profits of an inheritance to his sole use, and consumed them, is liable to be compeled to make a restitution. And this is the law not only when there are two heirs, but also when there are many.*

Si familiæ erciscundæ.] That, which the Romans called *judicium familiæ erciscundæ*, is termed in the law of *England* the partition of an inheritance; and this is made either by consent of co-heirs, or by the authority of the law. A partition by consent requires but little explanation: it may be made by reference to friends, by lot, or by any other way, which the parties can agree upon. But partition by law is, when one, or more, of the parceners would have partition, and the rest will not agree to it; for then he, or they, who desire, that the inheritance should be divided, must bring the writ *de partitione facienda*, by virtue of which those, who refuse to agree, may be compelled to see their lands or inheritance portioned out by twelve jurors, and assigned to each coheir by the sheriff. *vid. Co. Litt. lib.* 3. *cap.* 1. —*Terms de la ley v.* partition. *Bract. lib.* 3. *cap.* 33. 34. *de acquirendo rerum dominio.* Note, that joint-tenents, and tenents in common, could not be obliged at common law to suffer partition, but they are now compellable by act of parliament. *see* 31 *H.* 8. *cap.* 1. *and* 32 *H.* 8. *cap.* 32. *Co. Litt.* 109. 187. 198. *b.*

Communi dividundo.

§ V. Eadem interveniunt, etsi communi dividundo de pluribus rebus actum sit: quod si de una re, veluti de fundo: siquidem iste fundus commode regionibus divisionem recipiat, partes ejus singulis adjudicare debet; et, si unius pars prægravare videtur, is invicem certa pecunia alteri condemnandus est. Quod si commode dividi non possit, vel si homo forte, aut mulus erit, de quo actum sit, tunc totus uni adjudicandus est, et is invicem alteri certa pecunia condemnandus est.

§ 5. *The same law is also observed, when a suit is brought upon the action* communi dividendo, *for one particular thing only, it being but a part or parcel of an inheritance, as for example, a field, or any piece of ground, which, if it can be conveniently*

veniently divided, ought to be adjudged to each claimant in equal portions; and, if the ſhare of one is larger than the ſhare of another, the party, poſſeſſing ſuch large portion, muſt be condemned to make a recompenſe in money. But, if the thing ſued for is of ſuch a nature, that it can not be divided, as a ſlave, or an horſe for example, it muſt be given intirely to one of the coparceners, who muſt be ordered to make a ſatisfaction in money to the other.

Finium regundorum.

§ VI. Si finium regundorum actum fuerit, diſpicere debet judex, an neceſſaria ſit adjudicatio: quæ ſane uno caſu neceſſaria eſt, ſi evidentioribus finibus diſtingui agros commodius ſit, quam olim fuiſſent diſtincti. Nam tunc neceſſe eſt, ex alterius agro partem aliquam alterius agri domino adjudicari. Quo caſu conveniens eſt, ut is alteri certa pecunia debeat condemnari. Eo quoque nomine condemnandus eſt quiſque hoc judicio, quod forte circa fines aliquid malitioſe commiſit; verbi gratia, quia lapides finales furatus eſt, vel arbores finales excidit. Contumaciæ quoque nomine quiſque eo judicio condemnatur; veluti ſi quis jubente judice metiri agros paſſus non fuerit.

§ 6. *When the action* finium regundorum *is brought for the determination of boundaries, the judge ought firſt to examine, whether it is abſolutely requiſite to proceed to an adjudication: but it is, in one caſe, undoubtedly neceſſary; and this happens, whenever it becomes expedient, that any grounds ſhould be divided by more conſpicuous boundaries than they formerly were; and then neceſſity ſometimes requires, that a part of one man's ground ſhould be adjudged to another, in which caſe it is incumbent upon a judge to condemn him, whoſe eſtate is inlarged, to pay an equivalent to the other, whoſe eſtate is diminiſhed. It is alſo by virtue of this action, that any one may be proſecuted, who hath commited any fraud in relation to boundaries, by either removing ſtones, or cutting down trees, which ſupplied the place of landmarks. The ſame action will alſo ſubject any man to condemnation on account of contumacy, if he refuſes to ſuffer his lands to be meaſured at the command of a judge.*

Si finium regundorum.] The writs *de perambulatione faciendâ*, and *de rationabilibus diviſis*, are of the ſame uſe in the law of *England*, as the *judicium finium regundorum* in the *Roman* law.

The writ *de perambulatione* lies, when two lordſhips are near each other, and ſome incroachment hath been made; for then, by aſſent of both lords, the ſheriff ſhall take with him the parties and their neighbours, and ſhall make perambulation, and fix the bounds, as they were before. But, if one lord incroaches upon another, and will not agree to a perambulation, the party aggrieved ſhall have the writ *rationabilibus diviſis* againſt the other. *vid. Terms de la ley, and Fitzherbert's nat. brev. p.* 303. 309.

De adjudicatione.

§ VII. Quod autem iſtis judiciis alicui adjudicatum fuerit, id ſtatim ejus fit, cui adjudicatum eſt.

§ 7. *And note, that whatever is adjudged by virtue of a ſentence proceeding from any of theſe actions, the ſame inſtantly becomes the property of him, to whom it was ſo adjudged.*

TITULUS

TITULUS DECIMUS-OCTAVUS.

De publicis judiciis.

D. xlviii. T. i.

De differentia a privatis.

PUBLICA judicia neque per actiones ordinantur, neque omnino quicquam ſimile habent cum cæteris judiciis, de quibus locuti ſumus: magnaque diverſitas eorum eſt et in inſtituendo et in exercendo.

Public judgments are not introduced by actions; nor are they in any thing ſimilar to the other judgments, of which we have been treating. They alſo differ greatly from one another in the manner of being inſtituted and proſecuted.

Etymologia.

§ I. Publica autem dicta ſunt, quod cuivis ex populo executio eorum plerumque datur.

§ 1. *Theſe judgments are denominated public, or popular, becauſe, in general, they may be ſued to execution by any of the people.*

Diviſio.

§ II. Publicorum judiciorum quædam capitalia ſunt, quædam non capitalia. Capitalia dicimus, quæ ultimo ſupplicio afficiunt homines, vel etiam aquæ et ignis interdictione, vel deportatione, vel metallo. Cætera, ſi quam infamiam irrogant cum damno pecuniario, hæc publica quidem ſunt, ſed non capitalia.

§ 2. *Of theſe judgments ſome are capital, and others not capital. Thoſe, we term capital, by which a criminal is prohibited from fire and water, or condemned to death, to deportation, or to the mines. The other judgments, by which men are fined and rendered infamous, are public indeed, but yet not capital.*

Exempla; de læſa majeſtate.

§ III. Publica autem judicia hæc ſunt. Lex Julia majeſtatis, quæ in eos, qui contra imperatorem vel rempublicam aliquid moliti ſunt, ſuum vigorem extendit. Cujus pœna animæ amiſſionem ſuſtinet, et memoria rei etiam poſt mortem damnatur.

§ 3. *The following laws denounce public judgments. The law* Julia majeſtatis *extends it's force againſt thoſe, who have been hardy enough to undertake any enterprize againſt the*

the emperor or the republic. The penalty of this law is the loſs of life, and the very memory of the offendor becomes infamous after his death.

Lex Julia majeſtatis.] *vid. ff.* 48. *t.* 4. and *Calvin's lexicon juridicum.*

In *England* the ſtated judgment for high-treaſon, in all caſes except counterfeiting the coin, is, that the offendor ſhall be drawn to the place of execution, and there hanged by the neck and cut down alive;—that his intrails ſhall be taken out and burned, his head cut off, his body quartered, and his head and quarters put up, where the king ſhall direct.—The judgment in the caſe of a woman is,—"that "ſhe ſhall be drawn and burned."

In this judgment is implied the forfeiture of all the offendor's manors, lands, tenements, and hereditaments: his wife loſes her dower: his children become baſe and ignoble: he loſes his poſterity; for his blood is ſtained and corrupted. All his goods and chattels are likewiſe forfeited. 3 *Co. inſt.* 210. 211. *Strahan's Domat. ſupp.* *Hale's pl. of the crown,* 268.

De adulteriis.

§ IV. Item lex Julia de adulteriis coercendis, quæ non ſolum temeratores alienarum nuptiarum gladio punit, ſed et eos, qui cum maſculis nefandam libidinem exercere audent. Sed eadem lege etiam ſtupri flagitium punitur, cum quis ſine vi vel virginem vel viduam honeſte viventem ſtupraverit. Pœnam autem eadem lex irrogat ſtupratoribus; ſi honeſti ſunt, publicationem partis dimidiæ bonorum; ſi humiles, corporis coercitionem cum relegatione.

§ 4. *The law* Julia, *which was made for the ſuppreſſion of adulteries, not only puniſhes thoſe men with death, who violate the marriage bed of others, but alſo thoſe, who commit acts of deteſtable lewdneſs with perſons of their own ſex. The ſame law alſo inflicts a puniſhment upon all, who are guilty of the crime called* ſtuprum, *which is that of debauching a virgin, or a widow of honeſt fame, without uſing force. The puniſhment of this crime in perſons of condition is the confiſcation of a moiety of their poſſeſſions; but offendors of low degree undergo a corporal chaſtiſement with relegation.*

Lex julia.] *vid. ff.* 48. *t.* 5. *ad legem Juliam de adulteris coercendis.*

Gladio punit.] In *England*, and moſt other countries at this day, adulterers are puniſhed by fine.

Cum maſculis nefandam libidinem.] The crime here meant is buggery or ſodomy; under which words all unnatural carnal copulations are to be underſtood. The antient *Engliſh* lawyers all agree, that it ought to be puniſhed with death, *ultimo ſupplicio*; tho' they differ, as to the manner of inflicting it. *Britton* ſays, that *Sodomites* and miſcreants ſhall be burned:—*Fleta* writes, that they ſhall be buried alive; *peccantes et ſodomitæ in terra vivi conſodiantur.*—The author of the *mirror* alſo delivers himſelf much to the ſame purpoſe; and adds, that *Sodomie eſt crime de majeſtie vers le roy celeſtre.* But at this day by 25 *Hen.* 8. *cap.* 6. and 5 *Eliz.* 17. the commiters of this crime, whether male or female, are no otherwiſe puniſhable, than as common felons, who are denied the benefit of the clergy. 3 *Co. inſt. cap.* 10. *Hawk. pl. of the crown, lib.* 1. *cap.* 4.

De ſicariis.

§ V. Item lex Cornelia de ſicariis, quæ homicidas ultore ferro perſequitur, vel eos, qui hominis occidendi cauſa cum telo ambulant. Telum autem, ut Cajus noſter ex interpretatione legum duodecim tabularum ſcriptum reliquit, vulgo quidem id appellatur, quod arcu mittitur, ſed et nunc omne ſignificat, quod manu cujuſque jacitur. Sequitur ergo, ut lignum, et lapis, et ferrum, hoc nomine contineantur; dictum ab eo, quod

quod in longinquum mittitur, à Græca voce τηλε figuratum. Et hanc ſignificationem invenire poſſumus et in Græco nomine: nam, quod nos telum appellamus, illi βελος appellant ἀπο τε βαλλεσθαι. Admonet nos Xenophon; nam ita ſcribit; και τα βελη ἡμε ἐφερετο, λογχαι, τοξευματα, σφενδοναι, πλειστοι δὲ και λιθοι. Sicarii autem appellantur à ſica, quod ſignificat ferreum cultrum. Eadem lege et venefici capite damnantur, qui artibus odioſis, tam venenis, quam ſuſurris magicis, homines occiderint; vel mala medicamenta publice vendiderint.

§ 5. *The law* Cornelia de ſicariis *puniſhes thoſe, who commit murder, with death, and alſo thoſe, who carry weapons, called* tela, *with an intent to kill. The term* telum, *according to* Caius's *interpretation, commonly ſignifies an arrow made to be ſhot from a bow, but it is now uſed to denote any miſſive weapon, or whatever is thrown from the hand: it therefore follows, that a club, a ſtone, or a piece of iron, may be comprehended under that appellation. The word* telum *is evidently derived from the* Greek *adverb* τηλου, procul, *becauſe thrown from a diſtance. And we may trace the ſame analogy in the* Greek *word* βελος; *for what we call* telum, *the* Greeks *term* βελος, *from* βαλεσθαι *to throw*; *and of this we are informed by* Xenophon, *who writes thus.* --- Darts alſo were carried, ſpears, arrows, ſlings, and a multitude of ſtones. *Aſſaſſins and murderers are called* ſicarii *from* ſica, *which ſignifies a ſhort crooked ſword or poniard. The ſame law alſo inflicts a capital puniſhment upon thoſe, who practiſe odious arts, or ſell pernicious medicaments, occaſioning the death of mankind, as well by poiſon, as by magical incantations.*

Lex Cornelia de ſicariis.] *vid. ff.* 48. *t.* 8. *ad legem Corneliam de ſicariis et veneficis.*

Veneficei capite damnantur.] In *England* all perſons ſuſpected of conjuration, witchcraft, or inchantments, were antiently cited into the ſpiritual courts, where, if they were found guilty, ſentence was pronounced; upon which the aid of the ſecular power was demanded by the eccleſiaſtical judge, and the ſuppoſed delinquents were burned, as heretics, by virtue of the writ *de hæretico comburendo*, which was not taken away, till the 29th of *Charles* the 2d, *cap.* 9. 3 *Co. Inſt.* 44. 45.

Thus the eccleſiaſtical judges had the intire juriſdiction in reſpect to ſorceries and inchantments, which were all ranked under the general term hereſies, till the ſtatute of the 33 *H.* 8. which was the firſt ſtatute, by which any of theſe offenſes were made felony; but this act was repealed by the 1ſt of *Edw.* 6. *cap.* 12.

Conjuration and the invocation of wicked ſpirits were afterwards made felony by 5 *Eliz. cap.* 16. And again, by a ſtatute in the firſt year of *James* the firſt, by which the 5th of *Eliz.* is repealed.

The 1ſt of *Jac.* 1. *cap.* 12. is to the following purport.

" That the act of 5 *Eliz.* againſt conjurati-
" ons, inchantments, and witchcrafts, be utterly
" repealed. —— That if any perſon or perſons
" ſhall uſe, practice or exerciſe any invocation
" or conjuration of any evil and wicked ſpirit;
" or ſhall conſult, covenant with, entertain,
" imploy, feed, or reward any evil and wicked
" ſpirit to and for any intent or purpoſe; ——
" or take up any dead man, woman, or child,
" out of his, her, or their grave, or any other
" place, where the dead body reſteth, or the
" ſkin, bone, or any other part of any dead
" perſon, to be imployed in any manner of
" witchcraft, inchantment, charm or ſorcery,
" whereby any perſon ſhall be killed, deſtroy-
" ed, waſted, conſumed, pined or lamed in
" his or her body, or any part thereof; that
" then every ſuch offendor, or offendors, their
" aiders, abettors, and counſellors, being of
" any of the ſaid offenſes duly and lawfully
" convicted, ſhall ſuffer pains of death, as a
" felon or felons, and ſhall loſe the benefit of
" clergy and ſanctuary.

" And farther, to the intent, that all manner
" of practice, uſe or exerciſe of witchcraft, in-
" chantment, charm, or ſorcery, ſhould be
" from henceforth utterly aboliſhed, be it en-
" acted, that, if any perſon, or perſons, ſhall
" from and after the feaſt of St. *Michael* next
" coming, take upon him or them by witch-
" craft, inchantment, charm, or ſorcery, to
" tell or declare in what place any treaſure
" might be found, or where goods, or things
" loſt or ſtolen, ſhould be found, or to the
" intent to provoke any perſon to unlawful
" love,

" love; or whereby any cattel or goods of " any perſon, ſhall be deſtroyed, waſted, or " impaired; or to hurt or deſtroy any per- " ſon in his or her body, altho' the ſame " be not effected; that then all perſons, ſo " offending, and being convicted, ſhall ſuffer " a year's impriſonment, and ſtand in the pil- " lory once every quarter for ſix hours, and " there openly confeſs his, or her error, and " offenſe." The ſecond offenſe is felony. 1 *Jac.* 1. *cap.* 12.

Lord *Coke* hath written a learned comment upon this ſtatute, in which he declares, that it would be a very great defect in government to ſuffer ſo great an abomination, as conjuration, witchcraft, and ſorcery, to paſs with impunity. 3 *inſt.* 44.

But the tendency of the ſtatute of the 1ſt of *James* the 1ſt may beſt appear from the cheats, perjuries, and various other miſchiefs, which it produced, to the ruin of many innocent perſons; all which are but too well known to require any particular mention. This act nevertheleſs continued to be a ſcandal and reproach to the good ſenſe of the nation, till the 9th year of *George* the 2d, when it was enacted by parliament—— " That the ſtatute, made in the firſt " year of king *James* the firſt, intituled, *An* " *act againſt conjuration, witchcraft, and dealing* " *with evil and wicked ſpirits*, ſhall be repealed " and utterly void, except ſo much as repeals " the ſtatute of the 5th of *Elizabeth*, intituled " an act againſt conjuration, *&c. &c.*—that an " act paſſed in *Scotland*, in the ninth parlia- " ment of queen *Mary*, intituled, *Anentis witch-* " *crafts*, ſhall be repealed —— and that from " the 24th of *June* no proſecution, ſuit, or pro- " ceeding, ſhall be carried on againſt any per- " ſon for witchcraft, ſorcery, inchantment, or " conjuration, or for charging another with any " ſuch offenſe, in any court whatſoever in " *Great Britain* —— but that any perſon, pre- " tending to exerciſe witchcraft, tell fortunes, " or diſcover ſtolen goods, ſhall ſuffer impri- " ſonment for one whole year, ſtand in the " pillory once every quarter for an hour, and, " if the court ſhall think proper, be obliged to " give ſureties to behave well for the future." 9 *Geo.* 2.

De parricidiis.

§ VI. Alia deinde lex aſperrimum crimen nova pœna perſequitur, quæ Pompeia de parricidiis vocatur: qua cavetur, ut, ſi quis parentis aut filii, aut omnino affectionis ejus, quæ nuncupatione parentum continetur, fata præparaverit, (ſive clam, ſive palam, id auſus fuerit,) nec non is, cujus dolo malo id factum eſt, vel conſcius criminis exiſtit, licet extraneus ſit, pœna parricidii puniatur: et neque gladio, neque ignibus, neque ulli ſolemni pœnæ ſubjiciatur, ſed inſutus culeo cum cane, et gallo gallinaceo, et vipera, et ſimia, et inter eas ferales anguſtias comprehenſus, (ſecundum quod regionis qualitas tulerit,) vel in vicinum mare, vel in amnem, projiciatur: ut omnium elementorum uſu vivus carere incipiat, et ei cœlum ſuperſtiti, et terra mortuo, auferatur. Si quis autem alias cognatione vel affinitate perſonas conjunctas necaverit, pœnam legis Corneliæ de ſicariis ſuſtinebit.

§ 6. *The law* Pompeia de parricidiis *inflicts a new puniſhment upon thoſe, who commit parricide, which is the moſt execrable of all crimes; and by this law it is ordained, that whoever, either publicly or privately, haſtens the death of a parent or a child, or of any perſon comprized under the tye, or denomination, of a parent, ſhall be puniſhed as a commiter of parricide; and that any one, who hath adviſed, or been privy to the death of any of theſe perſons, is alſo guilty of parricide, altho' he is a ſtranger, and not related to their family. A criminal, in caſe of parricide, is neither put to death by the ſword, by fire, nor by any other ordinary puniſhment; for the law directs, that he ſhall be ſewed up in a kind of ſack, with a dog, a cock, a viper, and an ape, and, being put up in this horrid incloſure, ſhall be thrown either into the ſea, or an adjacent river, according to the ſituation of the place, where the*

puniſhment is inflicted: thus, whileſt he is yet alive, he is deprived of the very elements; ſo that his living body is denied the benefits of the air, and his dead body the uſe of the earth. But, if a man is guilty of the murder of any other perſons, related to him, either by cognation or affinity, he is only ſubject to the puniſhment inflicted by the law Cornelia de ſicariis.

Pompeia de parricidiis.] *vid. ff.* 48. *t.* 9. *Cod.* 9. *t.* 17. *De lege Pompeia de parricidis.*

In *England* parricide and homicide are not diſtinguiſhed, as to the puniſhment inflicted upon criminals.

De falſis.

§ VII. Item lex Cornelia de falſis, quæ etiam teſtamentaria vocatur, pœnam irrogat ei, qui teſtamentum vel aliud inſtrumentum falſum ſcripſerit, ſignaverit recitaverit, ſubjecerit, vel ſignum adulterinum fecerit, ſculpſerit, expreſſerit, ſciens, dolo malo. Ejuſque legis pœna in ſervos ultimum ſupplicium eſt; quod etiam in lege Cornelia de ſicariis et veneficis ſervatur: in liberos vero deportatio.

§ 7. *The law* Cornelia de falſis, *which is alſo called* teſtamentaria, *puniſhes any man, who knowingly and with a fraudulent intent, hath writen, ſigned, dictated, or produced a falſe will, or any other inſtrument; it alſo puniſhes every one, who hath made, ingraved, or in any manner counterfeited the ſeal of another. The puniſhment inflicted by the law upon ſlaves in theſe caſes is death, but the puniſhment of free perſons is deportation.*

Lex Cornelia de falſis.] *vid. ff.* 48. *t.* 10. 5 *Eliz. cap.* 14. 8 *Geo.* 1. *cap.* 22. 12 *Geo.* 1. *cap.* 32. 2 *Geo.* 2. *cap.* 25.

De vi.

§ VIII. Item lex Julia de vi publica ſeu privata adverſus eos exoritur, qui vim vel armatam, vel ſine armis, commiſerint. Sed, ſiquidem armata vis arguatur, deportatio ei ex lege Julia de vi publica irrogatur: ſi vero ſine armis, in tertiam partem bonorum ſuorum publicatio imponitur. Sin autem per vim raptus virginis, vel viduæ, vel ſanctimonialis, vel alterius, fuerit perpetratus, tunc et raptores, et ii, qui opem huic flagitio dederunt, capite puniuntur, ſecundum noſtræ conſtitutionis definitionem, ex qua hoc apertius poſſibile eſt ſcire.

§ 8. *The law* Julia, *concerning public and private force, takes place againſt all, who uſe force, whether they are armed or unarmed; but, if proof is made of an armed force, the puniſhment is deportation by that law; and, if the force was not accompanied with arms, the penalty to be inflicted is the confiſcation of one third part of the offendor's goods; nevertheleſs, if a rape is commited upon a virgin, a widow, a nun, or upon any other perſon, both the raviſhers and their accomplices are all equally ſubject to a capital puniſhment, according to the deciſion of our conſtitution, in which the ſtudent may read more at large of this matter.*

Lex Julia de vi.] *vid. ff.* 48. *t.* 6. *and* 7. *Ad legem Juliam de vi publica et privata.* Secundum noſtræ conſt. definitionem.] *vid. Cod.* 9. *t.* 13.

De

De peculatu.

§ IX. Item lex Julia peculatus eos punit, qui publicam pecuniam, vel rem ſacram, vel religioſam, furati fuerint. Sed, ſiquidem ipſi judices tempore adminiſtrationis publicas pecunias ſubtraxerint, capitali animadverſione puniuntur: et non ſolum hi, ſed etiam qui miniſterium eis ad hoc exhibuerint, vel qui ſubtractas ab his ſuſceperint. Alii vero, qui in hanc legem inciderint, pœnæ deportationis ſubjugentur.

§ 9. *The law* Julia de peculatu *puniſhes thoſe, who have been guilty of theft, in regard to public money, or any thing, which is ſacred: and, if judges themſelves, during the time of their acting as ſuch, commit a theft of this kind, their puniſhment is capital; and the puniſhment of all thoſe, who aſſiſt in ſuch a theft, or knowingly receive the things ſtolen, is alſo capital. But all other perſons, who offend againſt this law, are only ſubject to deportation.*

Lex Julia peculatus.] By the crime *peculatus* [ſo called *a pecore*, in which antiently all riches conſiſted] is meant the ſtealing, or embezling, of money, which belongs either to the church, or to the public in general. *vid. ff.* 48. *t.* 13.

De plagiariis.

§ X. Eſt et inter publica judicia lex Fabia de plagiariis, quæ interdum capitis pœnam ex ſacris conſtitutionibus irrogat, interdum leviorem.

§ 10. *The law* Fabia *againſt plagiaries is alſo numbered among public judgments; but, in conſequence of the imperial conſtitutions, the offendors againſt this law are ſometimes puniſhed with death, and ſometimes by a milder puniſhment.*

Lex Fabia de plagiariis.] *vid. ff.* 48. *t.* 15. *Cod.* 9. *t.* 20.

A plagiary in this place denotes a manſtealer, and is ſo called from *plagium*, which ſignifies man-ſtealing.

The puniſhment of a plagiary is death both by the divine law, and the canon law. *Exod. xxi.* 16. *Deut. xxiv.* 1. *Decret. G. ix. lib.* 5. *t.* 18. *de furtis.*

But, in *England*, the ſtealing of man, woman, or child, [called in the law *kidnapping*] is puniſhed by fine, pillory, &c. *Raym.* 474.

De ambitu, repetundis, annona, reſiduis.

§ XI. Sunt præterea publica judicia; lex Julia de ambitu, lex Julia repetundarum, et lex Julia de annona, et lex Julia de reſiduis: quæ de certis capitulis loquuntur, et animæ quidem amiſſionem non irrogant; aliis autem pœnis eos ſubjiciunt, qui præcepta earum neglexerint.

§ 11. *There are alſo other public judgments; ſuch are the* Julian *laws* de ambitu, repetundarum, de annona, de reſiduis; *which do not puniſh with death, but inflict other puniſhments upon thoſe, who offend.*

Lex Julia de ambitu.] *vid. ff.* 48. *t.* 14.

The crime, which the Romans called *ambitus*, is committed by procuring any public office with money, or other gifts: and it ſeems to be the ſame offence in regard to temporal offices, as ſimony is in regard to ſpiritual preferment. *Decret. Greg. ix. lib.* 5. *t.* 3.

But *ambitus*, or the buying and ſelling of offices, ceaſed to be criminal, and became common among the *Romans* ſoon after the demolition of the republic; and this practice continued, till *Juſtinian*, becoming ſenſible of it's evil tendency, inforced the antient laws in order to reſtrain it. *Nov.* 8. *cap.* 1. 7.

In *France* judicial offices are publicly ſet to ſale, and generally ſold to the higheſt bidder;

and perhaps, as *Vinny* obſerves, there may be leſs reaſon to prohibit this ſpecies of commerce in a monarchy than in a democracy.

But in *England* the ſtatute of the 5th and 6th of *Edw.* 6. reſtrains "all perſons, under pain "of forfeiture and diſability for the future, "from buying certain offices, which concern "the king's revenue, and the execution of "juſtice." And under theſe offices not only that of the chancellor of a dioceſe is comprehended, but alſo that of a commiſſary and regiſter: for it was reſolved in the caſe of doctor *Trevor*, the chancellor of a dioceſe in *Wales*, that both the offices of chancellor, and regiſter, are within the ſtatute, becauſe they concern the adminiſtration of juſtice. 3 *Co. inſt.* 148. 12 *Co. rep.* 78. 79. 3 *Lev.* 289. *Woodward v. Fox.*

Lex Julia repetundarum.] This law forbids all perſons in public offices to take money or preſents, either for adminiſtering juſtice, or commiting injuſtice. *Lege Julia repetundarum* [*pecuniarum*] *tenetur, qui, cum aliquam poteſtatem haberet, pecuniam ob judicandum, decernendumve, acceperit.* ff. 48. t. 11.

Forteſcue, on the laws of *England*, declares "bribery to be a great miſpriſion, which is "commited, when any man in a judicial place "takes any fee or penſion, robe or livery, gift, "reward or brocage of any perſon, who hath "to do before him any way, for doing his "office, or by color of his office, but of the "king only, unleſs it be of meat and drink, "and that of ſmall value. *cap.* 51." 3 *Co. inſt.* 145.

De annona.] The crime *fraudatæ annonæ* is that of abuſing the markets, by raiſing the price of proviſions, foreſtalling, monopolizing, *&c.*

This offenſe is puniſhable in *England* by impriſonment and forfeiture of the goods or merchandiſe foreſtalled. See 25 *Ed.* 3. *cap.* 3. 2 *Ric.* 2. *cap.* 2. 27 *Ed.* 3. *cap.* 11. 5. 6. *Edw.* 6. *cap.* 14, 3 *Co. inſt. p.* 195.

De reſiduis.] *Crimen reſidui* is commited by retaining the public money, or converting it to other uſes than thoſe, to which it was appropriated. *Lege Julia de reſiduis tenetur, qui publicam pecuniam delegatam in uſum aliquem retinuit, neque in eum conſumpſit.* ff. 48. t. 13.

Concluſio.

§ XII. Sed de publicis judiciis hæc expoſuimus, ut vobis poſſibile ſit, ſummo digito, et quaſi per indicem ea tetigiſſe: alioqui diligentior eorum ſcientia vobis, ex latioribus digeſtorum ſeu pandectarum libris, Deo propitio, adventura eſt.

§ 12. *But it is now time to conclude our inſtitutes; and we declare it to be our intent, that this brief expoſition of public judgments ſhould ſerve only, as an index, to give a general idea of that knowledge, which, thro' the bleſſing of God, may be moſt fully and particularly obtained, by peruſing the digeſts with a diligent attention.*

FINIS

LIBRI QUARTI ET ULTIMI

INSTITUTIONUM.

NOV. CXVIII.

ΚΕΦ. Α.

Περι διαδοχης των κατιοντων.

ΕΙ τις τοινυν των καλιοντων ὑπειη τῳ ἀδιαθετῳ τελευτησαντι, ὁιασδηποτε φυσεως ἠ βαθμυ, ἐιτε ἐξ ἀρρενογονιας ἐιτε ἐκ θηλυγονιας καταγομενος, και ἐιτε αὐτεξυσιος ἐιτε ὑπεξυσιος ἐιη, παντων των ἀνιοντων και των ἐκ πλαγιυ συγγενων προτιμασθω. Κἀν γαρ ὁ τελευτησας ἑτερυ ὑπεξυσιος ἠν, ὁμως τυς αὐτυ παιδας, ὁιασδηποτε ἀν ὡσι φυσεως ἠ βαθμυ, και αὐτων των γονεων προτιμασθαι κελευομεν, ὡν ὑπεξυσιος ἠν ὁ τελευτησας, ἐπ' ἐκεινοις δηλαδη τοις πραγμασιν, ἁτινα, κατα τυς ἀλλυς ἡμων νομυς, τοις πατρασιν ὐ προσποριζεται· ἐπι γαρ τῃ χρησει των πραγματων τυτων, ὀφειλυσῃ προσποριζεσθαι ἠ φυλατ]εσθαι, τυς περι τυτων ἡμων νομυς τοις γονευσι φυλατ]ομεν· ὑτω μεν]οιγε ὡς ε, ἐι τινα τουτων των κα]ιον]ων παιδας κα]αλιπον]α τελευ]ησαι συμβαιη, τυς ἐκεινυ ὑς ἠ θυγα-

CAP. I.

De deſcendentium ſucceſſione.

SI quis igitur deſcendentium fuerit ei, qui inteſtatus moritur, cujuſlibet naturæ aut gradus, ſive ex maſculorum genere ſive ex fœminarum deſcendens, et ſive ſuæ poteſtatis ſive ſub poteſtate ſit, omnibus aſcendentibus et ex latere cognatis præponatur. Licet enim defunctus ſub alterius poteſtate fuerit, tamen ejus filii, cujuſlibet ſexus ſint aut gradus, etiam ipſis parentibus præponi præcipimus, quorum ſub poteſtate fuerit, qui defunctus eſt, in illis videlicet rebus, quæ, ſecundum noſtras alias leges, patribus non acquiruntur: nam in uſu harum rerum, qui debet acquiri aut ſervari, noſtras de his omnibus leges parentibus cuſtodimus: ſic tamen, ut, ſi quem horum deſcendentium filios relinquentem mori contigerit, illius

τερας ἡ τυς ἀλλυς καλισνλας ἐις τον τυ ἰδιυ γονεως τοπον ὑπεισιεναι, ἐιτε ὑπεξυσιοι τῳ τελευτησαντι ἐιτε ἀυτεξυσιοι ἐυρεθειεν, τοσυτον ἐκ της κληρονομιας τυ τελευτησανλος λαμβανονλας μερος, ὁσοι δηποτε ἀν ὡσιν, ὁσον ὁ ἀυτων γονευς, ει ωεριην, ἐκομιζελο· ἡν τινα διαδοχην in ſtirpes ἡ ἀρχαιοτης ἐκαλεσεν· ἐπι ταυλης γαρ της ταξεως τον ϛαθμον ζητεισθαι ϐ βυλομεθα· ἀλλα μετα των ὑων και των θυγατερων τυς ἐκ τυ ωροτελευτησανλος ὑϊυ ἡ θυγατρος ἐγγονυς καλεισθαι θεσπιζομεν, ϐδεμιας ἐισαγομενης διαφορας, ἐιτε ἀρρενες ἐιτε θηλειαι ὡσι, και ἐιτε ἐξ ἀρρενογονιας ἐιτε ἐκ θηλυγονιας καλαγωνλαι, ἐιτε ὑπεξυσιοι ἐιτε και ἀυτεξυσιοι ἐιησαν. Και ταυτα μεν ωερι της των κατιοντων διαδοχης ἐτυπωσαμεν.

filios aut filias, aut alios deſcendentes, in proprii parentis locum ſuccedere, ſive ſub poteſtate defuncti ſive ſuæ poteſtatis inveniantur; tantam de hereditate morientis accipientes partem, quanticunque ſint, quantam eorum parens, ſi viveret, habuiſſet: quam ſucceſſionem in ſtirpes vocavit antiquitas: in hoc enim ordine gradum quæri nolumus: ſed cum filiis et filiabus ex præmortuo filio aut filia nepotes vocari ſancimus; nulla introducenda differentia, ſive maſculi ſive fœminæ ſint, et ſeu ex maſculorum ſeu fœminarum prole deſcendant, ſive ſuæ poteſtatis ſive ſub poteſtate ſint conſtituti. Et hæc quidem de ſucceſſionibus deſcendentium diſpoſuimus.

CHAPTER I.

Of the ſucceſſion of deſcendents.

If a man dies inteſtate, leaving a deſcendent of either ſex or any degree, ſuch deſcendent, whether he derives his deſcent from the male or female line, or whether he is under power or not, is to be prefered to all aſcendents and collaterals. And, a'tho' the deceaſed was himſelf under parental power, yet we ordain, that his children of either ſex or any degree ſhall be prefered in ſucceſſion to the parents, under whoſe power the inteſtate died, in regard to thoſe things, which children do not acquire for their parents, according to our other laws; for we would maintain the laws in reſpect to the uſufruct, which is allowed to parents: ſo that, if any of the deſcendents of the deceaſed ſhould die, leaving ſons or daughters or other deſcendents, they ſhall ſucceed in the place of their own father, whether they are under his power or *ſui juris*, and ſhall be intituled to the ſame ſhare of the inteſtate's eſtate, which their father would have had,

if

if he had lived. And this kind of ſucceſſion has been termed by the antient lawyers a ſucceſſion *in ſtirpes:* for in the ſucceſſion of deſcendents we allow no priority of degree, but admit the grandchildren of any perſon by a deceaſed ſon or daughter to be called to inherit that perſon together with his ſons or daughters, without making any diſtinction between males and females, or the deſcendents of males and females, or between thoſe, who are under power, and thoſe, who are not. Theſe are the rules, which we have eſtabliſhed, concerning the ſucceſſion of deſcendents.

Εἰ τις τ ινυν. Si quis igitur.] The three firſt chapters of this novel conſtitution deſerve the attentive conſideration of the reader, not only becauſe they contain the lateſt policy of the civil law in regard to the diſpoſition of the eſtates of inteſtates; but becauſe they are the foundation of our ſtatute law in this reſpect. vid. *Holt's* caſes, p. 259. *Peere Williams's* rep. p. 27. Prec. in chan. p. 593. Sir *Thom. Raymond's* rep. p. 436. And they are ſtill almoſt of continual uſe, by being the general guide of the courts in *England*, which hold cogniſance of diſtributions, in all thoſe caſes, concerning which our own laws have either been ſilent, or not ſufficiently expreſs.

Εἰς τον τ ἰδιν γονεως. In proprii parentis locum ſuccedere.] Nothing is more clear in the civil law, than that grandchildren, even when alone, (altho' they deſcend from various ſtocks and are unequal in their numbers,) would take the eſtate of their deceaſed grandfather *per Stirpes*, and not *per Capita*. Suppoſe therefore, that *Titius* ſhould die leaving grandchildren by three different ſons, already dead; to wit, three by one ſon, ſix by another, and twelve by another, each of theſe claſſes of grandchildren would take a third of the eſtate without any regard to the inequality of the numbers in each claſs. But, as to this point in *England*, the law-reports mention no judicial determination; yet it ſeems probable, that the courts, in which diſtributions are cogniſable, would order the diviſion of an eſtate in ſuch a caſe to be made *per Capita*; and this, partly from a motive of equity, and partly from a conſideration of the intent of the ſtatute, relating to the eſtates of inteſtates; for the ſtatute directs an *equal* and *juſt* diſtribution: and, when the act mentions repreſentation, it muſt be underſtood to refer to it, in thoſe caſes only, where repreſentation is neceſſary to prevent excluſion, but not to refer to it in thoſe caſes, where all the claimants are in equal degree, and therefore can take *ſuo quiſque jure*, each in his own right. vid. 23, 24, Car. 2, cap. 10. lib. 3. Inſt. pag. 4.

ΚΕΦ. Β.

Περι των ανιονίων διαδοχης.

Ει τοινυν ὁ τελευτησας καλιουτας μεν μη καταλιποι κληρονομες, ωαλιρ δε ἡ μηλιρ ἡ ἀλλοι γονεις ἀυτω ἐπιζησουσι, ωανλων των ἐκ ωλαγιου συγγενων τυλους ωρολιμασθαι θεσπιζομεν, ἐξηρημενων μονων ἀδελφων ἐξ ἑκαλερου γονεως συναπλομενων τω τελευτησανλι, ὡς δια των ἑξης δηλωθησελαι. Ει δε ωολλοι των ἀνιον-

CAP. II.

De aſcendentium ſucceſſione.

SI igitur defunctus deſcendentes quidem non relinquat heredes, pater autem aut mater aut alii parentes ei ſuperſint, omnibus ex latere cognatis hos præponi ſancimus, exceptis ſolis fratribus ex utroque parente conjunctis defuncto, ſicut per ſubſequentia declarabitur. Si autem plurimi aſcendentium vivunt,

των περιεισι, τους προλιμασθαι κελευομεν, οἱ τινες ἐγγυτεροι τῳ βαθμῳ ἐυρεθειεν, ἀρρενας τε και θηλειας, εἰτε προς μητρος εἰτε προς πατρος εἰεν. Ει δε τον αὐτον ἐχουσι βαθμον, ἐξ ἰσης εἰς αὐτους ἡ κληρονομια διαιρεθησεται, ὡστε το μεν ἡμισυ λαμβανειν παντας τους προς πατρος ἀνιοντας, ὁσοι δηποτε ἀν ὡσι· το δε ὑπολοιπον ἡμισυ τους προς μητρος ἀνιοντας, ὁσους δηποτε ἀν αυτους ἐυρεθηναι συμβαιη. Ει δε μετα των ανιοντων ευρεθωσιν ἀδελφοι ἡ ἀδελφαι ἐξ ἑκατερων γονεων συναπτομενοι τῳ τελευτησαντι, μετα των ἐγγυτερων τῳ βαθμῳ ἀνιοντων κληθησονται· ἐι και πατηρ ἡ μητηρ ἐιησαν, διαιρεμενης εἰς αὐτους δηλαδη της κληρονομιας κατα τον των προσωπων ἀριθμον· ἱνα και των ἀνιοντων και των ἀδελφων ἑκαστος ἰσην ἐχοι μοιραν, ἀδεμιαν χρησιν ἐκ της των υἱων ἡ θυγατερων μοιρας ἐν τουτῳ τῳ θεματι δυναμενου τε πατρος ἑαυτῳ πανταπασι ἐκδικειν, ἐπειδη ἀντι ταυτης της χρησεως μερος αὐτῳ της κληρονομιας και κατα δεσποτειας δικαιον δικ τυ παροντος δεδωκαμεν νομυ, ἀδεμιας φυλαττομενης διαφορας μεταξυ των προσωπων τυτων, ἐιτε θηλειαι ἐιτε ἀρρενες ἐιησαν, οἱ προς την κληρονομιαν καhos præponi jubemus, qui proximi gradu reperiuntur, maſculos et fœminas, ſive paterni ſive materni ſint. Si autem eundem habeant gradum, ex æquo inter eos hereditas dividatur; ut medietatem quidem accipiant omnes a patre aſcendentes, quanticunque fuerint, medietatem vero reliquam a matre aſcendentes, quantoſcunque eos inveniri contigerit. Si vero cum aſcendentibus inveniantur fratres aut ſorores ex utriſque parentibus conjuncti defuncto, cum proximis gradu aſcendentibus vocabuntur; ſi et pater aut mater fuerint, dividenda inter eos quippe hæreditate ſecundum perſonarum numerum, uti et aſcendentium et fratrum ſinguli æqualem habeant portionem; nullum uſum ex filiorum aut filiarum portione in hoc caſu valente patre ſibi penitus vindicare, quoniam pro hac uſus portione hæreditatis jus et ſecundum proprietatem per præſentem dedimus legem; differentia nulla ſervanda inter perſonas iſtas, ſive fœminæ ſive maſculi fuerint, qui ad hæreditatem vocantur, et ſive per maſ-

λαβμενοι,

λαμενοι, και ειτε δι' αρρενος ἡ θηλεως προσωπα συναπτονται, και ειτε αὐτεξουσιος ειτε ὑπεξουσιος ἡν, ὁν διαδεχονται.

culi ſive per fœminæ perſonam copulantur; et ſive ſuæ poteſtatis ſive ſub poteſtate fuerit is, cui ſuccedunt.

CHAPTER II.

Of the ſucceſſion of aſcendents.

But, when the deceaſed leaves no deſcendents, if a father, or mother, or any other parents, grand-fathers, great-grand-fathers, &c. ſurvive him, we decree, that they ſhall be prefered to all collateral relations, except brothers of the whole blood to the deceaſed, as ſhall hereafter be more particularly declared. But, if many aſcendents are living, we prefer thoſe, who are in the neareſt degree, whether they are male or female, paternal or maternal; and, when ſeveral aſcendents concur in the ſame degree, the inheritance of the deceaſed muſt be ſo divided, that the aſcendents on the part of the father may receive one half, and the aſcendents on the part of the mother the other half, without regard to the number of perſons on either ſide. But, if the deceaſed leaves brothers and ſiſters of the whole blood together with aſcendents, theſe collaterals of the deceaſed ſhall be called with the neareſt aſcendents; and, altho the ſurviving parents are a father and mother, the inheritance muſt be ſo divided according to the number of perſons, that each of the aſcendents, and each of the brothers, may have an equal portion; nor ſhall the father, in this caſe take to himſelf any uſufruct of the portions belonging to his ſons and daughters, becauſe by this law we have given him the abſolute property of one portion: and we ſuffer no diſtinction to be made between thoſe perſons, who are called to an inheritance, whether they are males or females, or related by males or females, or whether he, to whom they ſucceed, was, or was not, under power, at the time of his deceaſe.

Ει και πατηρ ἡ μητηρ εισιν. Si et pater aut mater fuerint.] By the Law of *England*, when a perſon dies inteſtate, leaving a father, the father is ſolely intituled to the whole perſonal eſtate of the inteſtate, excluſive of all others; and antiently, [i. e. in the reign of *Henry* the firſt. vid. Il. Her. primi, *Wilkins* editore, p. 266.] a ſurviving father, or mother, could have taken even the real eſtate of their deceaſed child. But this law of ſucceſſion was altered ſoon afterwards; for we find by *Glanville*, that, in the time of *Henry* the ſecond, a father or mother could not have taken the real eſtates of their deceaſed children, the inheritance being then carried over to the collateral line. vid. *Glanville*, lib. 7. cap. 1, 2, &c. 1 *Peere Williams* 50. And it has ever ſince been held as an inviolable maxim, that an inheritance cannot aſcend. *Co. Litt.* 11. a. But this alteration in the law, made ſince the reign of *Henry* the firſt, did not extend to perſonal eſtate, ſo that, before the ſtatute of the firſt of *James* the ſecond, if a child had died inteſtate without a wife, child, or father, the mother would have been intituled to the whole perſonal eſtate, excluſive of the brothers and ſiſters of the inteſtate; but it is enacted by that ſtatute, "that, if, after the death of a father, "any of his children ſhall die inteſtate, without "wife or children, in the life time of the mo-"ther, every brother and ſiſter, and their re-"preſentatives, ſhall have an equal ſhare with "her." 1 *Jac.* 2. cap. 17. § 6.

But ſhould it here be aſked, whether the brother of an inteſtate would exclude the grandfather by the civil law? the novel appears at firſt ſight to anſwer it very fully in the negative by enacting, "*that, if the deceaſed leaves brothers and ſiſters* "*together with aſcendents in the right line, theſe* "*collaterals ſhall be called with the neareſt aſcen-*"*dents, &c.*" And indeed the generality of writers; namely, *Gudelin*, *Forſter*, *Ferriere*, *Domat*, and others, all underſtand this paſſage, as admitting

admitting aſcendents and brothers to take jointly; yet a contrary interpretation has been given by ſome civilians, of whom *Voet* is the principal, whoſe reaſonings in ſupport of it are therefore here copied at large.

" Illud non ſatis expeditum eſt, an etiam cum " avo aut proavo, ubi alius proximior aſcendens " non eſt, fratres germani ejus, qui defunctus " eſt, concurrere debeant, an magis avo proa- " vove præferendi ſunt, eoſque excludant? Con- " curſum enim aſcendentium naturaliter gradu " remotiorum, quos nullus intermedius exiſtens " excludit, cum fratribus germanis defuncti tu- " entur plerique, moti eo, quod cum *proxime* " *aſcendentibus* fratres veniunt. vid. novel. 118. " Proximus autem ſit, quem nemo antecedit."

" Sed Juris rationibus convenientius videtur, " avum proavumve defuncti a fratribus ejus " germanis in ſucceſſione excludi; quia Impe- " rator in dicta novella 118. emphatice dixit, " fratres et ſorores cum *proximis gradu aſcendenti-* " *bus* vocari; qualis mentio *proximorum gradu* " inutilis plane ac ſuperflua eſſet, ſi non per " *gradu proximos* denotarentur illi, qui in primo " lineæ aſcendentis gradu ſunt; cum juris certi " atque indubitati ſit, nunquam in aſcendente " linea locum eſſe juri repræſentationis, per quod " remotior ſubintraret in locum proximioris de- " functi; atque adeo ſuffeciſſet, ſi generaliter " expreſſum eſſet, fratres cum *aſcendentibus* vo- " cari. Ne dicam hoc ipſo, quo in linea aſcen- " dente repræſentatio perſonæ proximioris ad- " miſſa non eſt, fieri non poſſe, ut avus vel pro- " avus defuncti, qui a patre vel matre defuncti " certo certius excluditur, concurreret cum fra- " tribus, qui cum patre matreque defuncti con- " currunt. Quibus accedit, quod ſententia, de " avo defuncti cum germanis ejus fratribus con- " currente, ad abſurda ducit. Si enim verum " eſt, quod in caſu quo fratres et ſorores cum " proximis gradu aſcendentibus ita concurrant, " ut hereditas inter eos ſecundum perſonarum " numerum dividenda ſit, ac aſcendentium et " fratrum ſinguli æqualem habeant portionem " ſecundum d. nov. 118. eveniret neceſſario, ut " remotiores aſcendentes ob defectum proximio- " rum cum fratribus defuncti concurrentes plus " fratribus nocituri eſſent, quam proximiores; " dum, poſitis duobus fratribus germanis de- " functi, pater et mater concurrens duas tantum " partes æquales auferendo efficerent, ut fratres " ſinguli quartam hereditatis fraternæ partem " capiant; quatuor autem avi aviæque exiſtentes, " viriles totidem partes occupando, non niſi ſex- " tam ſingulis defuncti fratribus relicturi eſſent; " ſicuti tantum partem decimam duo fratres ſin- " guli eſſent habituri, ſi cum proavis atque pro- " aviabus (quales octo eſſe poſſunt) deberent con- " currere. Quam autem a ratione id alienum " ſit, ut magis aliis concurſu ſuo noceant remo- " tiores, quam qui ejuſdem lineæ proximiores " ſunt, nemo, ut opinor, non ſponte ſatis agno- " ſcit. Denique tantum concurſum eſſe fratrum " cum patre et matre, non vero cum aliis aſcen- " dentibus remotioribus, ubi pater materque de- " ficit, aperte probant verba novellæ 118. dum " illic diſerte cautum, ſi cum aſcendentibus in- " veniuntur fratres aut ſorores ex utriſque pa- " rentibus conjuncti defuncto, eos *cum proximis* " *gradu aſcendentibus* vocari, *ſi aut pater aut mater* " *fuerint*: unde ſequitur, eos non omni caſu, nec " promiſcue cum ommibus aſcendentibus, venire; " ſed *ſi pater aut mater fuerint*: ideoque mox igi- " tur ſubjicitur, in hoc caſu *patrem nullum uſum* " *ex filiorum aut filiarum portione poſſe ſibi penitus* " *vindicare*, nulla *avi* facta mentione; cum ta- " men id *avo* æque interdicendum fuiſſet, ſi et " avus cum defuncti nepotis fratribus ſuccedere " potuiſſet, dum fratres ſuccedentes æque potu- " iſſent in avi quam in patris poteſtate eſſe. Ut " proinde nihil in contrarium efficiat, quod, in " jure, proximus dicatur, quem nemo antecedit: " cum id tum demum admitti debeat, quando " nulla inde abſurditas profluit; prout in hoc " caſu futurum, ſupra monſtratum eſt." vid. *Joannis Voet*. com. ad Pandectas, tom. 2. lib. 38. t. 17. § 15.

But this queſtion ſeems now to be ſettled in *England* in conſequence of three determinations; the firſt of which was given in the Exchequer in the caſe of *Poole* verſ. *Wilſhaw* on the 9th of july 1708: —— the ſecond in the caſe of *Norbury* verſ. *Vicars*, before Mr. *Forteſcue*, Maſter of the Rolls in november 1749 —— and the third was delivered on the 14th of Jan. 1754, in the caſe of *Evelin* verſ. *Evelin*, by the Lord Chancellor, who decreed in favor of the brother in excluſion of the grandfather, having founded his opinion partly in deference to the former determinations; partly in conſideration of the *preſent* common-law computation of degrees, relative to *real* eſtates; and partly upon the benefit, which muſt accrue to the Public by preferring a younger man to an older, the brother of a deceaſed perſon to the grandfather, *propter ſpem accreſcendi*.

And it was alſo declared to be the opinion of the court, that, if the point in queſtion had been *res integra*, and ſolely determinable by the *Roman* law, the decree would ſtill have been the ſame; which declaration, from ſo high an authority, muſt have great weight in aſcertaining the meaning of the Novel, and muſt incline civilians in general to think more favorably for the future of *Voet's* arguments, which were particularly quoted and much relied upon by the court.

ΚΕΦ. Γ.

Περι διαδοχης των εκ πλαγιου καλιουντων.

ΕΙ τοινυν ὁ τελευτησας μηδε κατιοντας μηδε ἀνιοντας καταλειψῃ, πρωτος προς την κληρονομιαν καλουμεν τους ἀδελφους και τας ἀδελφας, τους ἐκ του ἀυτου πατρος και της ἀυτης μητρος τεχθεντας, ους και μετα των πατερων προς την κληρονομιαν ἐκαλεσαμεν. Τουτων δε μη ὑποντων, ἐν δευτερᾳ taξει ἐκεινους τους ἀδελφους προς την κληρονομιαν καλουμεν, οἱτινες ἐξ ἑνος γονεως συναπτονται τῳ τελευτησαντι ἐιτε δια του πατρος μονου, ἐιτε δια της μητρος. Ει δε τῳ τελευτησαντι ἀδελφοι ὑπεισηαν, και ἑτερου ἀδελφου ἡ ἀδελφης προτελευτησαντων παιδες, κληθησονται προς την κληρονομιαν ἑιτοι μετα των προς πατρος και προς μητρος θειων, ἀρσενων τε και θηλειων· και, ὁσοι δηποτε ἀν ὡσι, τοσουτον ἐκ της κληρονομιας ληψονται μερος, ὁσον ὁ ἀυτων γονευς ἡμελλε λαμβανειν, ἐι ἐπεζησεν. Οθεν ἀκολουθον ἐστιν, ἱνα, ἐι τυχον ὁ προτελευτησας ἀδελφος, ου οι παιδες περιεισι, δι' ἑκατερου γονεως τῳ νυν τελευτησαντι προσ-

CAP. III.

De ſucceſſione ex latere venientium.

SI igitur defunctus neque deſcendentes neque aſcendentes reliquerit, primos ad hæreditatem vocamus fratres et ſorores ex eodem patre et ex eadem matre natos, quos etiam cum patribus ad hæreditatem vocavimus. His autem non exiſtentibus, in ſecundo ordine illos fratres ad hæreditatem vocamus, qui ex uno parente conjuncti ſunt defuncto, ſive per patrem ſolum, ſive per matrem. Si autem defuncto fratres fuerint et alterius fratris aut ſororis præmortuorum filii, vocabuntur ad hæreditatem iſti cum de patre et matre thiis, maſculis et fœminis; et, quanticunque fuerint, tantam ex hæreditate percipient portionem quantam eorum parens futurus eſſet accipere, ſi ſuperſtes eſſet. Unde conſequens eſt, ut, ſi forte præmortuus frater, cujus filii vivunt, per utrumque parentem nunc defunctæ

ωπῳ συνηπλετο, οἱ δε περιοντες ἀδελφοι δια τε πατρος μονε τυχον, ἡ της μητρος, ἀυτῳ συνηπλοντο, προλιμηθωσιν οἱ τεκνε παιδες των ἰδιων θειων, ἐι και τριτε ἐισι βαθμε, ἐιτε προς πατρος ἐιτε προς μητρος ἐιησαν οἱ θειοι, και ἐιτε ἀρρενες ἐιτε θηλειαι, ὡσπερ ὁ ἀυτων γονευς προελιμαλο, ἐι περιην. Και ἐκ των ἐναντιων, ἐι ὁ μεν περιων ἀδελφος ἐξ ἑκατερε γονεως συναπτοιτο τῳ τελευτησαντι, ὁ δε προτελευτησας δι' ἑνος γονεως συνηπτετο, τες τετε παιδας ἐκ της κληρονομιας ἀποκλειομεν, ὡσπερ και ἀυτος, ἐι περιην, ἐξεκλειετο. Το δε τοιετον προνομιον ἐν ταυτῃ τῃ taξει της συγγενειας μονοις παρεχομεν τοις των ἀδελφων, ἀρρενων ἡ θηλειων, ὑοις ἡ θυγατρασιν, ἱνα ἐις τα των ἰδιων γονεων δικαια ὑπεισελθωσιν· ἐδενι δε ἀλλῳ παντελως προσωπῳ, ἐκ ταυτης της taξεως ἐρχομενῳ, τετο το δικαιον συγχωρεμεν. Ἀλλα και ἀυτοις τοις των ἀδελφων παισι τοτε ταυτην την ἐυεργεσιαν παρεχομεν, ὁτε μετα των ἰδιων κρινονται θειων, ἀρρενων τε και θηλειων, ἐιτε προς πατρος ἐιτε προς μητρος ἐιεν. Ει δε μετα των ἀδελφων τε τελευτησαντος και ἀνιοντες, ὡς ἠδη προειπομεν, προς την κλη-

personæ jungebatur, superstites autem fratres per patrem solum forsan aut matrem ei jungebantur, præponantur istius filii propriis thiis, licet in tertio sint gradu, (sive a patre sive a matre sint thii, et sive masculi sive fœminæ,) sicut eorum parens præponeretur, si viveret. Et ex diverso, siquidem superstes frater ex utroque parente conjungitur defuncto, præmortuus autem per unum parentem jungebatur, hujus filios ab hæreditate excludimus sicut ipse, si viveret, ab hæreditate excludebatur. Hujusmodi vero privilegium in hoc ordine cognationis solis præbemus fratrum masculorum et fœminarum filiis et filiabus, ut in suorum parentum jura succedant: nulli enim alii omnino personæ, ex hoc ordine venienti, hoc jus largimur. Sed et ipsis fratrum filiis tunc hoc beneficium conferimus, quando cum propriis judicantur thiis masculis et fœminis, sive paterni sive materni sint. Si autem cum fratribus defuncti etiam ascendentes, sicut jam dixi-

ρονομιαν

ρονομιαν καλεισθαι, ὐδενι τροπῳ προς την ἐξ ἀδιαθετ̃ου διαδοχην του αδελφου ἡ της ἀδελφης παιδας καλεισθαι συγχωρουμεν· ὐδε ἐι ἐξ ἑκατερου γονεως ὁ ἀυτων πατ̃ηρ ἡ μητ̃ηρ συνηπτ̃ετο τῳ τελευτ̃ησαντ̃ι. Ὁποτ̃ε τοινυν τοις του ἀδελφου και της ἀδελφης παισι τοιουτ̃ο προνομιον δεδωκαμεν, ἱνα τον των γονεων ὑπεισιοντ̃ες τοπον μονοι τριτ̃ου ὀντ̃ες βαθμου μετ̃α των ἐκ πρωτ̃ου και δευτερου βαθμου προς την κληρονομιαν καλωντ̃αι· ἐκεινο προδηλον ἐστιν, ὁτι των θειων του τελευτ̃ησαντ̃ος ἀρρενων τε και θηλειων, ἐιτε προς πατ̃ρος ἐιτε προς μητ̃ρος ἐισαν, προτ̃ιμωντ̃αι, ἐι και ἐκεινοι τριτον ὁμοιως συγγενειας βαθμον ἐχοιεν.

Εἰ δε μητ̃ε ἀδελφους, μητ̃ε παιδας ἀδελφων, ὡς ἐιρηκαμεν, ὁ τελευτ̃ησας καταλειψει, παντ̃ας του̃ς ἐφεξης ἐκ πλαγιου συγγενεις προς την κληρονομιαν καλουμεν, κατ̃α την ἑνος ἑκαστου βαθμου προτ̃ιμησιν, ἱνα ὁι ἐγγυτ̃ερου τῳ βαθμῳ ἀυτοι των λοιπων προτ̃ιμωντ̃αι· ἐι δε πολλοι του̃ ἀυτου̃ βαθμου ἐυρεθωσι, κατ̃α τον των προσωπων ἀριθμον μεταξυ ἀυτων ἡ κληρονομια διαιρεθησετ̃αι· ὁπερ in capita ὁι ἡμετερου̃ λεγουσι νομοι.

mus, ad hæreditatem vocantur; nullo modo ad ſucceſſionem ab inteſtato fratris aut ſororis filios vocari permittimus; neque ſi ex utroque parente eorum pater aut mater defuncto jungebatur. Quandoquidem igitur fratris et ſororis filiis tale privilegium dedimus, ut in propriorum parentum ſuccedentes locum, ſoli in tertio conſtituti gradu, cum iis, qui in ſecundo gradu ſunt, ad hæreditatem vocentur; illud palam eſt, quia thiis defuncti maſculis et fœminis, ſive a patre ſive a matre, præponuntur, ſi etiam ille tertium cognationis ſimiliter obtineant gradum. Si vero neque fratres, neque filios fratrum, ſicut diximus, defunctus reliquerit, omnes deinceps a latere cognatos ad hæreditatem vocamus, ſecundum uniuscujuſque gradus prærogativam, ut viciniores gradu ipſi reliquis præponantur. Si autem plurimi ejuſdem gradus inveniantur, ſecundum perſonarum numerum inter eos hæreditas dividatur: quod *in capita* noſtræ leges appellant.

CHAPTER III.

Of the ſucceſſion of collaterals.

If a man leaves neither deſcendents nor aſcendents at the time of his death, we firſt call his brothers and ſiſters of the whole blood, whom we have alſo called to inherit with the fathers of deceaſed perſons.

But, when there are no brothers of the whole blood with the deceaſed, we call thoſe, who are either by the ſame father only, or by the ſame mother. And, if the deceaſed leaves brothers and alſo nephews by a deceaſed brother or ſiſter, theſe nephews ſhall be called to ſucceed with their uncles and aunts of the whole blood to the deceaſed; but, however numerous theſe nephews are, they ſhall be intituled only to that ſhare, which their parent would have taken, if alive. From whence it follows, that, if a man dies and is ſurvived by the children of a deceaſed brother of the whole blood, and alſo by brothers of the half blood, then his nephews, [that is, the children of his brother, by the whole blood,] are to be prefered to their uncles and aunts; for, altho' ſuch nephews are themſelves in the 3d degree, yet they are prefered, as their parent would have been, if living. And on the contrary, if a man dies, and is ſurvived by a brother of the whole blood, and by children of a brother of the half blood deceaſed, theſe nephews are excluded, as their father would have been, if he had lived. But among collaterals we allow the Privilege of repreſentation to the ſons and daughters of brothers and ſiſters, and no farther; and we grant it only to brothers and ſiſters children, when they concur with their uncles or aunts, paternal or maternal: for, when aſcendents are called to inherit, we by no means permit the children of a deceaſed brother or ſiſter to ſhare in the ſucceſſion; altho' the father or mother was of the whole blood with the deceaſed brother. But we have ſo far allowed the right of Repreſentation to brothers and ſiſters children, that being only in the 3d degree, they are called to inherit with thoſe, who are in the ſecond: and this is evident, becauſe brothers and ſiſters children are prefered to the uncle and aunts of the deceaſed, paternal as well as maternal; altho' they are all in the 3d degree of cognation.

But, if a deceaſed perſon leaves neither brothers nor brothers children, we then call all the other collaterals, according to the prerogative of their reſpective degrees, prefering the nearer to the more remote; and, if many are found in the ſame degree, the inheritance muſt be divided according to the number of perſons; and our laws diſtinguiſh this manner of dividing an inheritance by calling it a diviſion *in capita*.

Πρωῖας προς την κληρονομιαν. Primos ad hæreditatem vocamus.] We muſt here obſerve in relation to the diſtinction between the whole blood and the half blood, that in *England* the rules of law are different, according to the nature of the eſtate, which is to be taken; for, in caſe of lands the whole blood is always prefered, and *the half blood is no blood inheritable by deſcent*. 1 *Co.* inſt. 14. a. But, in reſpect to perſonal eſtate, the law has not always been fixed and certain; inaſmuch as the ſtatute of the 23d of *Car.* II. [for *the better ſettlement of the eſtates of inteſtates*] takes no notice of this diſtinction between the whole blood and the half blood, but directs, that diſtribution ſhall be made among all thoſe, who are in equal degree of kindred to the inteſtate. But, it being certain, that brothers and ſiſters of the half blood are in the ſame degree with brothers

thers and ſiſters of the whole blood, it hath been the general opinion, that brothers and ſiſters of the half blood were intituled, by virtue of the ſtatute, to an equal ſhare of the inteſtate's eſtate, with the brothers and ſiſters of the whole blood, altho' there are ſeveral precedents of judgments given, ſince the ſtatute, allowing the half blood to have but an half ſhare. But the law in this reſpect has been fully ſettled ever ſince the decree of the houſe of Lords in the caſe of *Watt's* and others verſ. *Crooke*, upon an appeal from a decree in chancery, which had been given in favor of the half blood, and was affirmed by the Houſe. vid. *Shower's* Caſes in Par. 108. and *Strahan's* Domat. 683.

Οὐδενὶ τρόπῳ. Nullo modo.] "Sancimus, ut, "ſi quis moriens relinquat aſcendentium aliquem "et fratres, qui poſſint cum parentibus vocari, "et alterius præmortui fratris filios, cum aſcen- "dentibus et fratribus vocentur etiam præmortui "fratris filii, et tantam accipiant portionem, "quantam eorum futurus erat pater accipere, ſi "vixiſſet." vid. Nov. CXXVII. cap. 1.

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